Rincon Band of Luiseño Indians

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February 23, 2010

Robin L. Burgess, Ph.D.
Division Chief of Cultural
Paleontological Resources and Tribal Consultation
Department of the Interior
Bureau of Land Management
1949 C St., NW, Mail Stop 204LS
Washington, DC 20240

Re: Comments on Draft PA Revision Strategy

The Rincon Band of Luiseño Mission Indians of the Rincon Reservation, California offers the following comments on the BLM's draft PA revision strategy:

- Consultation with tribes must occur early in the project planning process so that tribal comments can be considered in the agency's decision making.
- Tribes must be fully informed of the project location and scope
- The agency should designate a person as tribal liaison who will work with tribes during the consultation process
- Tribes must be provided adequate time to review and comment
- The agency must clearly describe how it decides which tribes to consult
- Include tribes in BLM training programs

Thank you for the opportunity to comment. If you have any questions or need additional information please contact Chris Viveros, Tribal Resource Officer at (760) 297-2632.

Respectfully,

Bo Mazzetti, Chairman

Stephanie Spencer, Vice Chairwoman

Charlie Kolb, Council Member

Steve Stallings, Council Member

Kenneth Kolb, Council Member

tfking106@aol.com
01/07/2010 12:04 PM

To robin_burgess@blm.gov
cc rnelson@achp.gov, cvaughn@achp.gov, Betsy_Merritt@nthp.org
bcc
Subject Comment on revision of nationwide programmatic agreement

Dear Robin,

In response to BLM's Federal Register notice of December 29, 2009, I'm writing to comment on your nationwide programmatic agreement (PA) for compliance with Section 106 of the National Historic Preservation Act, and your proposed strategy for the PA's revision.

My comments will be brief, because in my view, you simply need to reconsider the whole idea of this PA, with an eye to the sort of transparency and public accountability that is the current administration's watchword. The original PA was negotiated among a narrow range of institutional parties, and created a very closed system to which members of the public interested in historic preservation and the public lands find it difficult to gain access. The proposed strategy for revision has apparently been developed, again behind closed government doors, by the same range of parties, and is now put out as a *fait accompli* for public comment. Predictably, it proposes only tinkering with the existing agreement. This is not a formula for the kinds of transparency and public involvement that both the President and the Secretary have repeatedly called for.

It strikes me that the PA is premised on a fundamental misunderstanding of Section 106 as a process of review and sign-off on projects by the State Historic Preservation Officer (SHPO). It (quite understandably) seeks to minimize such review. In so doing, it creates a complex internal bureaucracy that effectively insulates BLM from public scrutiny of its impacts on historic properties. As BLM seems to recognize, to judge from some of the verbiage in the revision strategy, it also serves to short-circuit tribal consultation, despite its references to BLM's own internal guidance for such consultation.

I suggest that you scrap the PA and try simply complying with the Section 106 regulations for awhile – and by this I mean the actual regulations at 36 CFR 800, not the mythic SHPO-centered regulatory system that is so firmly believed in by agencies and SHPOs alike. I think it is probable that even the real regulatory system is unduly complicated for a lot of things that BLM does, but it is the default system for compliance with Section 106, and it would be wise, I think, to see if it can be made to work. If it cannot, or even while you are experimenting to see whether it can, you should open up your system to real public discussion focused on finding the most efficient ways to do what BLM needs to do in its daily work in a manner that is responsive to the public interest. I suspect that there are ways to use the NEPA substitution provisions of 36 CFR 800.8(c) to simplify BLM's compliance with Section 106 on larger projects, and ways to limit SHPO participation in compliance on routine small-scale actions that do not require anything as complex and impermeable as a PA. At the moment, however, any effort to pursue such improvements is likely to be thwarted by the complexities of the alternative systems created by BLM itself in the PA and its attendant state protocols.

Thank you for the opportunity to comment.

Tom King

Thomas F. King, PhD
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Blog: http://crmplus.blogspot.com/
Recently published by Dog Ear Publishing: *Thirteen Bones.* See www.tomfking.com.
Recently published by Left Coast Press: *Unprotected Heritage: Whitewashing Destruction of Our Natural and Cultural Environment* . February 2009
Also recently published: *Cultural Resource Laws and Practice (3rd Edition)* Altamira Press 2008. *Saving Places That Matter: a Citizens' Guide to the National Historic Preservation Act.* Left Coast Press 2007;
Cultural resource management classes See http://www.swca.com/jsps/training/training.htm

CONFEDERATED TRIBES
of the
GOSHUTE RESERVATION
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IBAPAH, UTAH 84034
PHONE (435) 234-1138
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GOVERNMENT-TO-GOVERNMENT CONSULTATION POLICY Of the CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

As a fiduciary, the United States and all its agencies owe a trust duty to the Confederated Tribes of the Goshute Reservation Tribe and other federally recognized tribes.
See United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707 (1987); united State v. Mitchell,
463 U.S. 206, 225 (1983); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

This trust relationship has been described as "one of the primary cornerstones of Indian law," *Felix Cohen, Handbook of Federal Indian Law 221 (1982),* and has been compared to one existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. *See, e.g., Mitchell, 463 U.S. at 225.*

The United States' trust obligation includes a substantive duty to consult with a tribe in decision-making to avoid adverse impacts on treaty resources and duty to protect treaty-reserved rights "and the resources on which those rights depend." *Klamath Tribes v. U.S., 24 Ind. Law Rep. 3017, 3020 (D.Or. 1996).*

The duty ensures that the United States conduct meaningful consultation "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the...decision maker." *Lower Brule Sioux Tribe v. Deer, 911 F.Supp 395, 401 (D. S.D. 1995).*

Further, Executive Order 13175 provides that each "agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

According to the President's April 29, 1994 Memorandum regarding Government-to-Government Relations with Native American Tribal Governments, federal agencies "shall assess the impacts of Federal Government plans, projects,

programs, and activities on tribal trust resources and assure that Tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities."

As a result, Federal agencies must proactively protect tribal interest, including those associated with tribal culture, religion, subsistence, and commerce. meaningful consultation with the Confederated Tribes of the Goshute Reservation is a vital component of this process.

Consultation is the formal process of negotiating, cooperation, and mutual decision-making between two sovereigns: the Confederated Tribes of the Goshute Reservation (CTGR) and the United States (including all federal agencies).

Consultation is the process that ultimately leads to the development of a decision, not just a process or a means to an end. This most important component of consultation is the ultimate decision.

Consultation does not mean notifying the Tribe that an action will occur, requesting written comments on that prospective action, and then proceeding with the action. In this scenario, the decision is not affected. "Dear Interested Party" letters are not consultation. It is equally important to understand that as a sovereign government, a Tribe may elect not to conduct government-to-government consultation or may decide to limit the scope of their consultation as needed.

The Confederated Tribes of the Goshute Reservation regard the objectives of Consultation as:

1. Assure that the Confederated Tribes of the Goshute Reservation Tribe Business Council (CTGR) understands the technical and legal issues necessary to make an informed policy decision;

2. Assure federal compliance with treaty and trust obligations, as well as other applicable federal laws and policies affecting tribal culture, religion, subsistence, and commerce;

3. Improve policy-level decision-making of both CTGR and the federal government;

4. Bilateral decision-making between two sovereigns (co-management of resources);

5. Ensure the protection of CTGR resources, culture, religion, and economy;

6. Ensure compliance with tribal laws and policies;

7. Develop and achieve mutual decisions through a complete understanding of technical and legal issues; and

8. Improve the integrity of federal-tribal decision.

CTGR views the process of consultation as follows:

1. Consultation works through both technical and policy-level meetings to differentiate between technical and policy issues allowing for proper technical level staff consultation and then policy-level consultation for those issues that remain unresolved or for those issues that are clearly only resolvable at the policy level.

2. Consultation is the process of coming to common understanding of the technical and legal issues that affect, or are affected by, a decision and then using this understanding to formulate a decision.

3. Meaningful consultation requires that federal agencies and Tribes understand their respective roles and have a basic understanding of the legal underpinnings of the government-to-government relationship, including the responsibility of the federal government under the Trust doctrine.
4. In addition, federal agencies will benefit from some understanding of tribal culture, perspectives, worldview, and treaty rights. Tribal governments must understand the policy decision-making authority of the federal agency.

5. Tribal governments must understand the non-tribal politics of the federal agency decision that consultation will affect.

It is critical to note that our tribal government cannot understand the politics of the federal agency decision without personal communications. Similarly, we understand the federal agency cannot understand the Tribe's issues and concerns unless agency staff meets with the Tribe to discuss those issues and concerns.

Without communication, consultation is meaningless and a mutual decision is difficult or impossible.

The CTGR has determined that the consultation process works like this:

1. Federal agency contacts CTGR or its appointed point-of-contact to notify of an impending project proposal or to conduct an activity that may or may not impact the tribal resource.

2. CTGR responds back that this issue is important and that it would like to initiate consultation.

3. CTGR requests federal agency technical experts meet with the tribe (or CTGR requests a policy level meeting). Consultation has been initiated.

4. Technical and legal issues are discussed; and the result is that the tribe understands the proposal and federal agency staff understands at technical level why this proposed activity is of concern to the Tribe. This allows respective parties to brief respective policy entities and to provide informed opinions and recommendations.

5. Consultation is initiated between policy-level decision-makers from both the Tribe and the federal agency.

6. Additional meetings are held, Federal agency and Tribe formulate a decision.

7. Assurances are made that the decision is consistent with federal laws and tribal laws and policies. This means the decision is consistent with applicable natural and cultural resource laws and policies.

8. For the CTGR specifically, it means the decision protects the resources to which the Tribe has specific treaty-reserved rights and enables continued practice of tribal religious, cultural, and subsistence activities.

"Arrow Coyote"
<acoyote@ctclusi.org>
01/20/2010 08:42 AM

To Roberta_Estes@blm.gov
cc
Subject National Programmatic Agreement

Roberta,

The following comments are in regard to revision of the National Programmatic Agreement for compliance with the National Historic Preservation Act.

- Notification is not the same as consultation. The BLM archaeologist needs to make a follow-up phone on projects, particularily where there is a a high potentail for cultural resources.
- Tribes should be notified of any lands the BLM is considering for exchange or surplus.
- Natural resources are also cultural resources and BLM lands that contain plants tribes traditionally gathered and still continue to gather should be protected and tribes given access to those areas.

Arrow Coyote, MA, RPA
Cultural Resource Protection Coordinator
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"Meisler,Marty"
<mmeisler@mwdh2o.com>
01/27/2010 06:16 PM

To <Robin_Burgess@blm.gov>
cc
bcc
Subject Comments on Notice of Intent to Revise 1997 Programmatic Agreement

History: This message has been replied to and forwarded.

Dear Ms. Burgess,

Comments from The Metropolitan Water District of Southern California on the subject Federal Register Notice are attached for your consideration.

Thank you.

Marty Meisler
Senior Environmental Specialist
Environmental Planning Team
Metropolitan Water District of Southern California
213.217.6364

Comments on BLM Proposed PA Revision.pdf

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Executive Office

January 22, 2010

Ms. Robin Burgess
BLM Preservation Officer
U.S. Department of the Interior
Bureau of Land Management
1849 C Street, NW., Mail Stop 204-LS
Washington, DC 20240

Sent Via E-Mail

Dear Ms. Burgess:

Intent to Revise the 1997 Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers

The Metropolitan Water District of Southern California (Metropolitan) appreciates this opportunity to provide input regarding the intended approach for revisions to the cited Programmatic Agreement (PA). Metropolitan's 26 member agencies provide drinking water to nearly 19 million people in parts of Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties of southern California. Metropolitan's mission is to provide its service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way. Metropolitan currently delivers an average of 1.7 billion gallons of water per day to a 5,200-square-mile service area.

To support its mission, Metropolitan currently operates facilities throughout southern California, and is vested in water resources and infrastructure in much of the state. Many of these facilities are adjacent to lands administered by the Bureau of Land Management (BLM), with some requiring use of public and dedicated easement across BLM land for access. To ensure continued operation and maintenance of existing facilities, and opportunities for improvements that may be required to maintain adequate supplies of water, Metropolitan is keen on maintaining its cooperative relationship with the BLM and has an interest in the revisions to the PA.

Key Goals of Revision

Regulations and agreements promulgated by the BLM, such as the 1997 PA, in its revised form, potentially have bearing on the way in which Metropolitan will implement future projects,

including operating its current facilities and improving or expanding its systems. Thus, Metropolitan is hopeful that the revisions to the 1997 PA further streamline and clarify the BLM's process for complying with the requirements of Section 106 of the National Historic Preservation Act. While Metropolitan is committed to preservation and proper management of historic properties, we have found certain aspects of the Section 106 process to be onerous, unpredictable, and time-consuming. Largely owing to a lack of clarity in implementation of the process, and vaguely defined roles and responsibilities of certain parties under Section 106, environmental clearance for major capital improvement projects has been delayed in the past, at significant cost. As stated in the key goals, the proposed revisions to the PA hold promise for streamlining and clarifying two important elements that have delayed the process in the past: (1) phasing the Section 106 consultation process, especially as it relates to compliance with the National Environmental Policy Act (NEPA); and (2) Native American consultation. Metropolitan offers specific comments on those issues, below, as these topics are addressed in specific proposed revisions to the PA.

3. Revision of "Cultural Resource Management" Procedures

a. It is proposed that a new component of BLM compliance procedures will be inserted to include phased identification for large-scale projects and programs and the relationship between the PA, protocols, manuals, handbook, and 36 CFR Part 800 regulations. Metropolitan supports these revisions and recommends that particular detail be provided regarding the relationship between compliance with 36 CFR Part 800 regulations and NEPA, with further consideration by the California State Office for developing protocols that provide integration with the California Environmental Quality Act, as well. The current PA and existing protocols and manuals provide little guidance for this integration. Greater clarity in the following elements is needed for projects that are phased: (1) definition of an Area of Potential Effects for initial inventory when a project has not been engineered and multiple alternatives are under consideration; (2) protocols that specify what level of inventory for potential historic properties is adequate for purposes of comparison of alternatives; (3) protocols that specify at what stage in alternatives selection or project development determinations of eligibility must be advanced; and (4) guidance for the level of consultation with interested parties, especially Native Americans, that is adequate and appropriate during initial stages (alternatives analysis) of project analysis.

b. The Advisory Council on Historic Preservation has commented that "Item 'e' conveys key tribal consultation principles and seems out of place in the section headed *Cultural Resource Management* procedures. This topic is also proposed for expansion and revision in Section 5, *Cooperation and Enhanced Communication.* Because issues of Native American consultation are matters of both process and communication, Metropolitan is not so concerned about where in the revised PA the topics subsumed by Native American consultation are addressed. However,

Metropolitan is eager to see the sections on Native American participation and consultation expanded, detailed, and clarified considerably. It is our understanding, from the *Basis for the Addendum*, that such clarification is a primary intent of the currently proposed revisions to the PA.

From Metropolitan's standpoint these issues have been the greatest impediment to timely and predictable compliance with 36 CFR Part 800, and revision is greatly needed. Stipulations and protocol beyond those provided in 36 CFR Part 800 and existing BLM Manuals must be fully and clearly addressed in the revised PA. Here, Metropolitan agrees with the ACHP statement that procedures should be spelled out in the PA, rather than referring to the BLM Manuals. Clarification on the following topics should be included, at a minimum: (1) who is authorized to conduct government-to-government consultation; (2) what issues are relevant and subject to government-to-government consultation under Section 106 (such consultations should be limited, in accordance with the statute, to project decisions only on matters related to cultural resources); (3) what types of communication constitute government-to-government consultation; and (4) what constitutes a diligent effort at eliciting Native American concerns. Finally, and perhaps most importantly, time-frames for Native American responses during the consultation process must be established and enforced.

Cooperation and Enhanced Communication

Section b. Comments regarding *Cultural Resource Management* are also relevant to this section.

Because the BLM-tribe protocols developed under these proposed revisions may constitute the foundation of the revisions to the 1997 PA, Metropolitan urges the BLM and SHPO to provide opportunity for public input during development and revision of those protocols. In particular, Metropolitan requests further notification during development/revision of the California BLM-tribal protocols.

Metropolitan appreciates this opportunity to provide comments and looks forward to continuing our cooperative relationship with both the California BLM and the California SHPO. If you have any questions, please contact Dr. Marty Meisler of my staff at (213) 217-7374.

Very truly yours,

Martin Meisler

FOR Delaine W. Shane
Manager, Environmental Planning Team

MM
(Public folders\EPT\Draft Letters\26-JAN-10 BLM Comment Letter on Historic PA)

"Audie Huber"
<AudieHuber@ctuir.org>
01/28/2010 08:21 PM

To <Robin_Burgess@blm.gov>
cc
bcc
Subject FW: Comments on PA development and strategy

Apparently got the e-mail address wrong. I'll try again.

A

From: Audie Huber
Sent: Thursday, January 28, 2010 5:16 PM
To: 'robinburgess@blm.gov'
Subject: Comments on PA development and strategy

Robin, please find attached the comments of the Confederated Tribes of the Umatilla Indian Reservation Department of Natural Resources Cultural Resources Protection Program regarding the BLM request for input on the Programmatic Agreement discussions. If you have any questions, please feel free to contact me via e-mail or the numbers below. Thank you.

A

Audie Huber
Intergovernmental Affairs Manager
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation
(w) 541-429-7228
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(c) 541-969-3123
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CTUIR DNR CRPP BLM PA Letter 1 28 2010 PA.pdf

Confederated Tribes
of the
Umatilla Indian Reservation
Department of Natural Resources
Cultural Resources Protection Program
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(541) 276-3629 Fax (541) 276-1966

January 28, 2010

Dr. Robin Burgess, BLM Preservation Officer
U.S. Department of the Interior
Bureau of Land Management
1849 C Street, NW.
Mail Stop 204-LS
Washington, DC 20240

Submitted Electronically to Robin_Burgess@BLM.gov

Dear Dr. Burgess:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) Cultural Resources Protection Program (CRPP) provides the following comments to the Federal Register notice of December 29, 2009 seeking comments on the intent to revise the 1997 Bureau of Land Management (BLM) Programmatic Agreement (PA) with the Advisory Council for Historic Preservation (ACHP). The CRPP appreciates the opportunity to comment on this PA and the efforts of BLM to consult with tribes on this.

General Comments:

The CTUIR CRPP does not believe that consultation occurred in the development of the 1997 PA nor the resulting regulatory changes which occurred in 2004 to the BLM handbook and manuals. We cannot document that there were no communications between BLM and the CTUIR CRPP in the development of the PA, as it was 13 years ago. However, the CTUIR CRPP finds it extremely difficult to believe that there was tribal consultation that resulted in the policy for reburial on BLM lands. That policy, adopted in 2004, states:

> **The BLM's managers shall not directly or indirectly authorize or permit the reburial of repatriated, removed, or transferred human remains and/or other NAGPRA materials, on public lands.**

BLM Handbook 8120-1, Ch. II, Sec. C(3) (emphasis in original.)

Further, it is difficult to believe that there was tribal consultation in the decision of BLM to entirely withdraw their general policy on consultation with tribes and replace it with their statutory obligations to consult under the cultural resource laws, such as the Native American

Graves Protection and Repatriation Act, the National Historic Preservation Act and the Archaeological Resources Protection Act. In 2004 H-8160 and M 8160 were replaced with H-8120 and M-8120. CTUIR staff did not become aware of this fact until our meeting with BLM on May 7, 2009 when it was explained by BLM headquarters the logic behind the withdrawal. BLM staff explained that the general consultation guidance was removed in lieu of the development of a broad, overarching consultation policy for the entire Department of the Interior. Needless to say, that policy was never developed. The CTUIR CRPP suggests that the BLM reinstate H-8160-1 until an updated replacement can be developed so that BLM staff are made aware of their responsibilities to tribes beyond statutorily required consultation under cultural resource laws.

The CTUIR has documented consultation challenges with the BLM over the years. Most recently we responded to a request for consultation input of the U.S. Department of Agriculture dated January 15, 2010 (attached). This letter documented many of the CTUIR CRPP's concerns regarding consultation with BLM, particularly the revisions to the BLM manuals under the 1997 PA. Some of the concerns in the January 2010 letter were also reflected in our October 15, 2008 letter regarding BLM cultural resource policies (attached). Rather than participate in the listening sessions that the BLM conducted, the CTUIR met directly with BLM Region and Headquarters staff on May 7, 2009. Primarily we reiterated our concerns of the October 15, 2008 letter. However, after receiving via e-mail the report of the listening sessions, we would like to know how the process for revision of BLM regulations on consultation and cultural resources relates to the PA. I understand the letter of August 21, 2008 asked for input on cultural resources and consultation relating to the development of the PA, but I am not clear as to whether your cultural resource or consultation polices are under revision, and whether that will be subject to consultation if it occurs.

I will not go into all the specifics of our October 2008 or January 2010 letter, so please review them for content. I will, however, point to a general problem we have with many federal agencies, the BLM included. As addressed above, the BLM Handbook and Manual specifically identify consultation with tribes regarding consultation with varying degrees of effectiveness. Agencies, because they do not have specific statutory direction to consult with tribes regarding the impacts to treaty reserved resources end their inquiry into tribal interests at cultural resources. The CTUIR DNR has worked closely with the local BLM offices to attempt to remedy this, but it is a recurrent problem at times. BLM should clarify that their responsibilities to tribes do not begin and end with cultural resource laws and that BLM has a trust responsibility to tribes.

Programmatic Agreement Comments:

The strategy for the development of the PA sounds good. However, we would like several things incorporated into the strategy. First, the CTUIR has found that BLM Regions and Districts have confused compliance with the national and statewide PAs with complete compliance with the NHPA. In other words, if the district has complied with their PA with the State Historic Preservation Office (SHPO), they do not take the Section 106 process any further, including tribal consultation. This is a source of great frustration for the CTUIR CRPP. The BLM has an

obligation to consult with the CTUIR regarding undertakings that have the potential to impact historic properties. Just because the BLM office has an agreement with SHPO that says they do not need to consult with the state for every undertaking, the BLM retains the obligation to consult with tribes under the NHPA, particularly for projects with the potential to affect historic properties of religious or cultural significant to tribes. We are not signatories to the PA or statewide agreements, therefore the BLM is obligated to comply with the entire, non-streamlined, Section 106 process with us. We would like this made very clear in the PA. It has been a consistent problem with many agencies.

The CTUIR CRPP is very interested in expeditious resolution of our comments on the BLM cultural resource policies that we sent to the BLM on October 15, 2008. I would appreciate if you could contact Carey Miller, CRPP Archaeologist or Audie Huber, DNR Intergovernmental Affairs Manger regarding how the comments will be addressed.

We appreciate the opportunity to comment on the BLM revisions to your cultural resource policies and PA development. We request to have the opportunity to review any early drafts of the PA, revised regulations or state level protocols. If you have any questions, please feel free to contact me or the individuals identified above at (541) 276-3447.

Sincerely,

Teara Farrow Ferman

Teara Farrow Ferman, Program Manager
Cultural Resources Protection Program

Cc: Audie Huber, CTUIR DNR IGAM
Carey Miller, CTUIR DNR CRPP Archaeologist
D. Bambi Kraus, NATHPO

CONFEDERATED TRIBES
of the
Umatilla Indian Reservation
Department of Natural Resources
ADMINISTRATION
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January 15, 2010

Office of Assistant Secretary
Indian Affairs
Department of the Interior
MS 4141
1849 "C" St. NW
Washington, DC 20240

Submitted Electronically to: tribalconsultation@bia.gov

Dear Tribal Consultation Staff:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) provides the following comments in response to the November 23, 2009 letter from the United States Department of the Interior (USDOI) requesting input on implementing a "consistent and comprehensive Department-wide tribal consultation policy and process upon which tribes can rely." The USDOI is responsible for the second largest portion of public lands in the ceded territory of the CTUIR through the Bureau of Land Management. These comments will largely focus on examples of consultation efforts over the last 10 years, to attempt to define some specific recommendations.

Proper consultation depends on getting the right information to the right people in a timely manner. The November 23, 2009 letter is a good beginning point for recommendations to improve consultation by USDOI agencies. The letter from USDOI was directed at the tribal chair and was not, as far as I have been able to tell, provided to tribal staff. One consistent message we convey to agencies is that letters to tribal chairs or elected leaders, without providing the letters concurrently to tribal staff is not an effective means to initiate consultation. Tribes such as the CTUIR have many employees and departments. Correspondence should be addressed to the tribal chair with copies provided to the appropriate staff so that letters will get to the appropriate people in a more timely manner. This also reduces the risk that the correspondence is lost in the mail or elsewhere in transit.

Another important tool for consulting with tribes is tribal liaisons or staff working directly with tribes. The USDOI has a number of agencies that have tribal liaisons who are in regular contact with tribes. These liaisons have information about communicating with tribes within their respective regions. I would encourage USDOI to communicate directly with those staff to develop an electronic distribution list for requests such as the November 23, 2009 letter so that United States Postal Service is not the sole avenue of initiation of consultation.

Both the distribution of information to appropriate staff and the use of electronic distribution are important measures to ensure that information reaches the right people. It is appropriate that communications from USDOI Headquarters be addressed to the tribal leadership. However, these communications must also be provided to appropriate staff who can immediately respond without having to wait for letters to be directed through channels.

I will attempt to answer the questions posed in the November 23, 2009 letter directly:

- **What Federal actions of the Department should initiate consultation?**

As a general rule, actions or policies which potentially directly or indirectly impact tribal treaty reserved or other resources, tribal access to those resources, or the tribal right to enjoy those resources trigger the need for consultation. While this answer may appear vague, elements of the answer can be refined in discussions with tribes themselves. Only the tribes themselves can define what their resources are and what impacts are going to be significant or what types of actions need consultation. I will provide some examples of incomplete or inadequate consultation.

First, the 2004 revision to the BLM Handbook and Manual that replaced section 8160 with 8120 is an example of an agency action that should have been subject to consultation.[1] Section 8120 focuses exclusively on consultation with tribes under the cultural resource statutes, such as the NHPA, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act (NAGPRA) and Sacred Sites Executive Order 13007. This approach neglects any discussion of treaty reserved rights and resources and vastly restricts the scope of the Trust Responsibility in a way that is inconsistent with the law. In short, we believe the entire section needs to be rewritten in consultation with Indian tribes in order to be legally valid.

Second, the June 2005 Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States is an example of an inadequate attempt at consultation. The EIS documents the attempted consultation with tribes as follows:

> The BLM developed a process to offer specific consultation opportunities to "directly and substantially affected" Tribal entities, as required under the provisions of E.O. 13175. Starting in October 2003, Tribal entities located in or with interests in the 11-state study

[1] Indeed, the Tribe did not even learn of the revision until a May 2009 meeting with BLM's Washington, D.C. staff regarding the agency's cultural resources and consultation policies.

> area were contacted by mail by the BLM State Directors. In September 2004, the same Tribal entities were contacted by mail by the BLM State Directors advising them of the availability of the Draft PEIS for review and comment. Table 7.2-1 at the end of this chapter lists the Tribal entities that were contacted by state. Through the course of the entire PEIS preparation process, only three Tribes - Lovelock Pauite, Taos Pueblo, and Pawnee Nation of Oklahoma - indicated an interest in consultation. The BLM will continue to work with these Tribes. In addition, the BLM will continue to implement government-to-government consultation on a case-by-case basis for site-specific wind energy development proposals.

This consultation attempt inappropriately began with a "Dear Tribal Leader" letter. Instead of sending a generic letter, it would be preferable if tribal liaisons communicated directly with the tribes' chairmen or governing bodies and offer consultation. Wind energy in the western U.S. has a high potential to impact tribes, particularly those tribes with off-reservation treaty reserved rights. The fact that only three tribes expressed an interest is a good indicator that the consultation efforts of BLM were inadequate. That resulted in inadequate treatment of tribal treaty rights in the EIS; in 650 pages, tribal treaty rights were mentioned exactly once. Given the explosion of wind energy projects that has occurred across the West, the BLM should prepare a new EIS, or at least revisit the existing EIS, particularly for the Northwest, where there are a significant number of tribes that retain off-reservation treaty reserved rights.

When USDOI agencies are negotiating agreements with other federal agencies, such as Programmatic Agreements with the Advisory Council on Historic Preservation under the National Historic Preservation Act, tribal consultation is necessary. The lack of such consultation continues to frustrate the protection of tribal rights and resources. While the states have a seat at the negotiating table through the National Conference of State Historic Preservation Officers (NCSHPO), the tribes do not. The National Association of Tribal Historic Preservation Officers is not a signatory to PAs and does not represent tribes in the same way NCSHPO represents state agencies. Recently, the BLM published in the Federal Register a notice of intent to revise the 1997 Programmatic Agreement with the Advisory Council on Historic Preservation. 74 Fed. Reg. 68862-3, December 29, 2009. The BLM had initiated discussions with tribes prior to the notification in the Federal Register. This effort of BLM to involve tribes in the revision of their PA is a good step, however, there are numerous other agencies within DOI who have used the Federal Register notification process as the sole avenue of tribal involvement. Further, the CTUIR DNR has had difficulty getting agencies to work with us when they are negotiating PAs with states. It is imperative that agencies work with tribes on state level agreements because agencies often view their obligations to SHPOs as the end of their Section 106 responsibilities, and fail to consider that tribal consultation might involve more than consultation with the state.

- **At what point in the process should tribes be involved to participate?**

As early as possible, before decisions are made, and once it is determined that tribal rights or resources may be impacted by an action.

- **How far in advance should the Department and its bureaus give notice of consultation?**

See above. Further, consultation should occur when a proposed action is identified that has enough specificity to have potential impacts on tribal resources. Consultation should then occur immediately such that tribal consultation can substantively influence the action.

- **Who should be invited to participate in consultation?**

Generally speaking, consultation should be between the United States and federally recognized tribes. We have found that when federal agencies invite states or private entities to consultation with tribes, the Trust Responsibility gets confused with the federal government's general obligation to seek public involvement under the National Environmental Policy Act (NEPA). There are of course instances in which it is necessary to involve states, state agencies or private parties, but it is essential that the special trust relationship between the tribes and the United States be maintained and reinforced so that tribal rights and interests aren't simply weighed or balanced against the general public interest.

Another concern regarding the parties to consultation regards the sensitivity of the information discussed. Cultural resources information is extremely sensitive to tribes, and they often do not want that discussed with any more outside entities than absolutely necessary. Further, most cultural resource information is protected from release under statutory exemptions to the Freedom of Information Act. Public discussion of this information risks it's release to the general public, endangering cultural practices and sacred sites.

- **How should consultation occur?**

Please find attached the CTUIR definition of consultation. This paper identifies the process and timelines for consultation. As noted above, consultation should occur when a proposed action is identified that has enough specificity to have potential impacts on tribal resources. Consultation should then occur immediately such that tribal consultation can substantively influence the action.

- **Should timelines be considered in consultation processes?**

From our experience, timelines are often necessary in the consultation process. However, if the timelines are not sufficiently flexible to account for tribal consultation needs, the whole point of tribal consultation is defeated. Generally, when undertaking consultation on a national level with tribes, 60 to 90 days is generally a minimum appropriate timeframe for discussions, meetings, questions and formal responses on a first draft.

- **How should consultation follow up occur?**

Generally, tribal consultation should be followed up by a letter to the tribe, explaining how the agency plans to address the tribe's concerns or interests and an invitation for further discussions

if the tribe wishes to continue consultation to reach a desired outcome. This does not mean the agency simply informs the tribe of its decision, but rather discloses how the tribal interests, rights and concerns will be addressed. When agencies disclose their reasoning as to why they made the decision, it can lead to further discussions about ways to address tribal concerns.

There have been two notable recent consultation efforts where adequate follow up has not occurred. Fifteen months ago the CTUIR DNR Cultural Resources Protection Program provided detailed comments to the BLM regarding a request for comments on their cultural resources policies. The CTUIR followed up that letter with a meeting on May 7th, 2009. To date, the CTUIR has received no response to our concerns regarding the BLM cultural resources policies.

In another instance, BLM completely revised their policies in the BLM Handbook and unilaterally prohibited reburial on BLM lands in December of 2004 without any tribal consultation. The Handbook states: **"The BLM's managers shall not directly or indirectly authorize or permit the reburial of repatriated, removed, or transferred human remains and/or other NAGPRA materials, on public lands."** BLM Handbook, H-8120-1, II-1(C)(3) (emphasis in original.) The Handbook still contains this language today, even after the BLM issued Instructional Memorandum 2007-002, Bureau of Land Management (BLM) Reburial Policy on BLM Lands. The CTUIR DNR strongly urges the BLM to revise their reburial policies in consultation with tribes to reflect the guidance in IM 2007-002.

- **How should the Department coordinate among its agencies and bureaus as well as with other Federal departments?**

The USDOI is a large department with multiple agencies and components. The CTUIR DNR would appreciate greater consistency among USDOI agencies. For instance, we seldom receive any letters from the Bureau of Reclamation (BOR) or the BIA defining undertakings or the Area of Potential Effect under the NHPA. Because the BOR and BIA are not communicating with us, we have nothing to respond to until we are at the project implementation stage.

- **What, if any, alternatives might be employed such as conferences, workshop sessions, or task forces to improve communication and coordination with tribes?**

One continuing difficulty the CTUIR DNR has had with agencies is internal education regarding the rights and interests of tribes.

Agencies should have internal working groups to undergo formal "lessons learned" evaluations of tribal consultation efforts. All too often, consultation requests result in a report that is dutifully printed and filed, while the agencies do not implement suggestions that result from the process. Further, failures in consultation are not treated as the learning tools that they represent. By formally evaluating successes and failures, the USDOI can improve consultation.

Technical Suggestions:

If the USDOI is intending to develop a policy on consultation, we can offer the following general suggestions which are important, often overlooked, opportunities to improve the process.

1. Letters requesting input from tribes should be followed up with responses to tribal concerns raised. Typically, when the CTUIR provides a response regarding an action to a federal agency's requests for suggestions to improve consultation, it receives no reply or feedback as to how the tribal concerns were addressed or incorporated into the policy.
2. Many agencies, including those within the USDOI, confuse consultation with tribes under cultural resource statutes as the beginning and end of their obligation to consult with tribes. This is similar, but not identical to the confusion between the NHPA and NEPA mentioned above. Many tribes have reserved treaty rights on lands managed by the USDOI which are not specifically governed by the NHPA. For instance, the CTUIR possesses treaty rights that include, but are not limited to, gathering roots, berries and other plants, grazing and hunting on unclaimed lands and fishing at usual and accustomed stations. These rights can be impacted by a myriad of federal actions. Only as of late have agencies become more aware of this fact and have begun to consult. However, many agencies still act as if their obligations to consult are limited to impacts to archaeological sites. It should be made very clear that tribal rights extend beyond cultural resource authorities.
3. Do not overlook opportunities to disseminate important information to tribes. The USDOI has a number of agencies which have tribal liaisons. Each of these liaisons can provide valuable input into measures to consult with tribes. In the instance of the December 4, 2009 letter, it came only from USDOI headquarters and was not, as far as we can tell, directed to tribal liaisons to ensure that it was provided to the appropriate staff. Had this occurred, I am confident more tribes would be providing information to the USDOI.
4. There needs to be an effort to improve compliance with the National Historic Preservation Act. Many federal agencies do not have a sufficient number of archaeologists to cover compliance with the NHPA by an agency. For instance, the Bureau of Indian Affairs has one archaeologist in the Portland Area Office who is responsible for the BIA efforts in Idaho, Oregon, Washington, as well as parts of Alaska and Montana. This is a vast area with 45 reservations and 87 tribes. The BIA needs more archaeologists in the Portland Area Office to address compliance with the NHPA for tribal lands and BIA undertakings.
5. The USDOI and their agencies should never overlook an opportunity to directly communicate with tribes. It is important to have a defined point of contact, but nothing prevents headquarters, regions and districts from communicating with tribes on broad policy proposals. Don't be afraid to meet with tribes, even before specific issues arise in order to develop relationships. The CTUIR annually meets with the Forest Service to discuss their schedule of work. Pursuant to our consultation policy and our Memorandum of Understanding with the Umatilla, Malheur and Wallowa-Whitman National Forests, we have staff meetings, followed by meetings with tribal committees and finally the Board of Trustees, to review the projects for the coming year.

In addition to our definition of consultation, I have attached a document developed by the CTUIR to assist staff working with tribal governments. It is a short document entitled Points of Protocol for Working with Tribes. It has been helpful in discussions with federal, state and private entities.

In conclusion, the CTUIR DNR has a long history of development of consultation policies, agreements and avenues of collaboration with our federal co-managers. The CTUIR DNR also has a vested interest in improving consultation between our respective agencies and departments. I would appreciate it if your staff could contact me regarding future discussions about revisions to USDOI consultation policies. I think it appropriate that we remain involved in future drafting efforts. Further, I believe a meeting between USDOI and the CTUIR BOT regarding this effort would help promote information exchange and could provide the USDOI valuable insight into tribal rights, resources, interests, authorities and responsibilities. Please have your staff contact Audie Huber, Intergovernmental Affairs Manager of the CTUIR DNR, to arrange a Government-to-Government meeting with the CTUIR Board of Trustees and the USDOI. You may contact Mr. Huber at 541-429-7228.

Please note that the address of the CTUIR has changed. The CTUIR recently constructed a tribal governance center. Our old address of P.O. Box 638 or 73239 Confederated Way, Pendleton, OR, 97801 is no longer functional. Our new address is

CTUIR
46411 Timine Way
Pendleton, Oregon 97801

We appreciate the opportunity to comment on this effort. If you have any questions, please feel free to contact me at 541-276-3447 or Audie Huber at the number above.

Respectfully,

Eric Quaempts, Director
Department of Natural Resources

The Confederated Tribes of the Umatilla Indian Reservation

Consultation: Government to Government (or otherwise)

WHAT IS CONSULTATION?

CONSULTATION. Deliberation of persons on some subject. State District Court of Third Judicial Dist. in and for Powell County, 85 Mont. 215, 278 P. 122, 125. A conference between the counsel engaged in a case to discuss its questions or arrange the method of conducting it. In French Law. The opinion of counsel upon a point of law submitted to them. Black's Law Dictionary, DeLuxe Fourth Edition. West Publishing Co., (1951).

CONSULTATION \,kan(t)-sel-'ta-shen\ n **1:** COUNCIL, CONFERENCE; *specif*: a deliberation between physicians on a case or its treatment **2:** the act of consulting or conferring. Webster's New Collegiate Dictionary, G & C MERRIAM COMPANY, (1979).

Consultation is the formal process of negotiation, cooperation and policy-level decision-making between the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and the United States federal government. As such, consultation is the bilateral decision-making process of two sovereigns: the Confederated Tribes of the Umatilla Indian Reservation and the United States Government.

It is critical to understand that consultation is not just a process or a means to an end. Rather, consultation is the process that ultimately leads up to and includes a **decision**. ***The most important component of consultation is the ultimate decision***. Consultation then is the formal effort between two sovereigns of making policy level decisions.

It is equally important to understand what consultation is not. Consultation is not notifying a Tribal government that an action will occur, requesting written comments on that prospective action, and then proceeding with the action. In this scenario the decision is not affected. This is not consultation.

WHAT ARE THE OBJECTIVES OF CONSULTATION?

a. Assure that CTUIR Board of Trustees understands the technical and legal issues necessary to make an informed policy decision.

b. Improved policy-level decision making of both CTUIR and federal government.

c. Bi-lateral decision making among sovereigns (co-management).

d. Protection of CTUIR lifestyle, culture, religion, economy.

e. Compliance with Tribal laws.

f. Compliance with federal Indian law; federal statutes; federal policy.

g. Develop and achieve mutual decisions.

h. Improve the integrity and longevity of decisions.

HOW DOES CONSULTATION WORK?

Consultation works through the same procedures and steps that are common-place for most federal agencies: technical meetings and policy meetings. From a practical standpoint, consultation requires an ability to differentiate between technical and policy issues; this allows for proper technical level staff consultation and then policy-level consultation for those issues that remain unresolved or for those issues that are clearly only resolvable at the policy level. Consultation is the process of coming to common understanding of the technical and legal issues that affect or are affected by a decision. Consultation is using this common understanding to make a decision.

Consultation does not portend to mandate a certain decision; most Tribal governments are much more willing to address cooperatively a decision that on the surface is distasteful than if they had not been thoroughly consulted with prior to facing that distasteful decision.

Meaningful consultation requires that federal agencies and Tribes understand respective roles and have a basic understanding of the legal underpinnings of the government-to-government relationship, including the responsibility of the federal government under the Trust doctrine. In addition, federal agencies will benefit from some understanding of tribal culture, perspectives, world view, and aboriginal rights. Tribal governments must understand the policy decision-making authority of the federal agency. Tribal governments must understand the non-tribal politics of the federal agency decision that consultation will affect.

Tribal governments must also understand the federal and state laws within which the agency must operate. In these examples, it is critical to note that a Tribal government cannot understand the politics of the federal agency decision without personal communications. Similarly, the federal agency cannot understand the Tribe's world view unless agency staff meet with the Tribe to discuss that world view. The lesson here is that consultation has a foundation of communication. Without communication, consultation is thwarted and a mutual decision is impossible.

Thus in a hypothetical example, consultation works like this:

1. Federal agency contacts Tribal government to advise of an impending project proposal or to conduct an activity that may or may not impact a tribal resource or issue.[1]

2. CTUIR responds back that this issue is important and that it would like to initiate consultation. CTUIR requests federal agency technical experts meet with CTUIR technical representatives (or CTUIR requests a policy level meeting).

3. Consultation has been initiated. Technical staffs meet. Technical and legal issues are discussed; the result is that CTUIR staff understand the proposal and federal agency staff understand at technical level why this proposed activity is of concern. This allows respective technical staff to brief respective policy entities and to provide informed opinions and recommendations.

4. CTUIR staff brief the proper Tribal policy entity. Consultation steps are defined, written down and then transmitted to federal agency.[2] Agreement is reached upon this consultation process.

5. Additional meetings are held, if necessary, leading up to the decision.

6. Federal agency and CTUIR formulate a decision. Ultimately and optimistically this decision is consistent with federal laws and tribal laws and policies. This means the decision is consistent with applicable natural and cultural resource laws and policies, with the Doctrine of Trust Responsibility and with federal Indian law. For the CTUIR specifically, it means the decision protects the resources to which the CTUIR has specific aboriginal and treaty reserved rights, protects the unique culture and world view and enables continued practice of the Tribal religion.

Most important is that leading up to the decision, the Tribal Government and the federal government have communicated. Mutual understanding and trust have been developed. Without mutual understanding and mutual trust a mutual decision is nearly unthinkable. History is replete with examples of such failures. In any event, the CTUIR perspective regarding the decision to formally consult or not to consult is that those entities required by law or policy to consult with Tribes is obviously to consult, or at the minimum, ask the CTUIR. The consequences of consulting when not required is preferred to the consequences of misjudging and not consulting when required.

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[1] It is crucial to note here that the federal agency contacted the CTUIR because of an impending ***decision*** that the federal agency will have to make in the near future. Remember, it is that ***decision*** that consultation is focused upon. Also note that, depending upon the issue, the CTUIR could have contacted the federal agency to initiate consultation.

[2] These steps are usually no more complicated than additional technical level meetings, later policy level meetings, potential mutual measures to obtain additional information, and finally a policy level meeting to make the ultimate decision.

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TREATY JUNE 9, 1855 • CAYUSE, UMATILLA AND WALLA WALLA TRIBES

Points of Protocol For Working With Tribes

Developed by the Confederated Tribes of the Umatilla Indian Reservation and its Tamastslikt Cultural Institute

1. **Listen. Be Patient.** Sometimes your enthusiasm, your needs and your commitment to your ideas prevents you from hearing or being an active listener.

2. **Learn that each community or tribe has its own timeline for getting things done.** It may not be the same as your timeline. Adjust. Start earlier. Keep going back. Do follow-up. Share your target dates and be willing to change them.

3. **Each community or tribe has its own definition of success.** It may differ from yours. We are rebuilding nations. Your priorities may not be ours, but they may intersect on a mutually beneficial project.

4. **Respect -- earn it every day.** Do your homework; learn about your potential partner. Usually the burden of educating new partners about us is left to us. Remember fundamental human courtesies and be aware that Native people have been de-humanized (in museums, literature, movies, and policies) for centuries.

5. **Relationships are built on points of agreement.** Make lists; document what you agree to/on. Live up to agreements, every day. Formally seek permission to record, photograph, edit or use the name of the person or tribe in a proposal. If collaborating, offer review, edit and approval well before the product deadline.

6. **Be direct, be straight, and tell the truth.** Most Tribes have had at least 200 years of someone trying to sell us goods we don't want. Know what you are seeking and recognize that whatever "it" is, is subject to negotiation.

7. **Solve problems together.** Define a way to do it together. Accept that we all arrive with biases and they may not help solve problems. Do not make assumptions.

8. **You are a guest in the community or tribe.** We have been here a long time against terrible odds and we are not going away. Many people with good intentions have come and gone. You may become very familiar but remember you are a guest.

9. **Serve elders. They are the heart of the community/tribe.** And, they back you up when times get rough. If you see that someone needs help, offer and do it. Get chairs, water, coffee... Don't make elders stand or serve you. Take care of them.

10. **Understand turnover.** Cultures that had stability for thousands of years are recovering from a couple hundred years of cleric and federally subsidized attacks, secular and non-secular, on that stability. Recovery does not occur overnight in any life, community or culture.

11. **Have a sense of humor.** It has helped us survive and endure unbearable times. Be respectful when appropriate but be willing to laugh at yourself and joke with others, too.

12. **Thank people and organizations.** Some cultures believe that you should give thanks seven times. Doing so helps focus on the good repeatedly.

Confederated Tribes
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Department of Natural Resources
Cultural Resources Protection Program
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October 15, 2008

Jerry Cordova
BLM Tribal Liaison
Bureau of Land Management
Department of the Interior
1849 C Street NW
Washington DC 20240

Re: Revisions to BLM Tribal Consultation Policies

Dear Mr. Cordova:

This letter represents a formal request to initiate consultation regarding the BLM tribal consultation protocol pursuant to your letter dated August 21, 2008l. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Cultural Resources Protection Program (CRPP) would like to meet with you and your staff coordinating this revision to the consultation policy and associated revision to the Oregon Programmatic Agreement under the National Historic Preservation Act (NHPA). The CTUIR has had a variety of issues with cultural resources consultation with the BLM, most notably the issuance of permits under the Archaeological Resources Protection Act (ARPA) and failure to consult under the NHPA. This letter is intended only to begin the dialogue on these issues, with the hopes of improving the BLM consultation policy and increase cultural resource interaction between the BLM and tribes. These issues identified in this letter are not the entirety of our concerns with the BLM consultation policy or Programmatic Agreement and we wish to consult further on these issues.

One of our most serious concerns is that we have discovered cultural resources permits issued by BLM in our traditional territory we were not consulted on. The reason for this appears to be the regulations which do not mandate consultation except for major testing and excavations. For instance, the language in the regulations regarding tribal notification seem to be written with a preference for no tribal notification.

> The State Director or Field Office managers, as appropriate, are responsible for notifying and consulting with Indian tribes when work proposed in an application for a permit might have a harmful or destructive effect on sites or areas that have tribal religious or cultural importance in accordance with ARPA and NAGPRA (see "site of religious or cultural importance" and

> "cultural item," Glossary of Terms). **In general, only permits for major testing programs and excavation and/or removal are expected to be subject to consultation requirements** (see .12B7 and .13). . .
>
> (Emphasis added.)

The CTUIR CRPP finds it difficult to comprehend why BLM only believes it is obligated to consult for major testing and excavation. This eliminates virtually all projects involving cultural resource work on BLM lands. Further, because BLM does not issue permits to its own staff, it is not evident from these regulations that testing and excavations by BLM employees or contractors would be subject to consultation under the NHPA. The CTUIR CRPP would like to be consulted for all cultural resource work being conducted on BLM lands either by BLM staff or outside companies. ARPA states;

> If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 470hh of this title.
>
> 16 USC 470cc(c)

It is important to note that unless and until the BLM consults with the CTUIR regarding individual permits, or BLM actions, they have no way of knowing where tribal religious or cultural sites are or whether the conduct would harm or destroy those sites. While we recognize the BLM need not issue permits to itself for archaeological investigations, BLM cultural resource work is as significant a concern to us as is outside archaeologists and it poses as significant a danger to tribal religious and cultural sites. Therefore we would like to be consulted.

As quoted above, the BLM manual only mandates consultation for major testing programs and excavations. From our reading of the BLM manual, there are four different types of cultural resource activities permitted by the BLM: [8150.11D]

1. Survey and recordation.
2. Limited testing and/or collection
3. Excavation and/or removal
4. Any combination of 1 – 3 above in a single permit.

The regulations are internally inconsistent about what uses are permitted. Even though survey and recordation, 8150.11D1, is identified in the regulations as "non-impacting studies of cultural properties that will not include excavation and/or removal of material remains or other significant disturbance of cultural properties," the regulations authorize collection of surface artifacts and excavation through shovel testing. The section reads, (emphasis ours.)

1. Survey and Recordation may be authorized for applicants who propose to identify, evaluate, record, or **conduct similar non-impacting studies of cultural properties that will not include excavation and/or removal of material remains or other significant disturbance of cultural properties**. As agreed in advance and specifically limited in the permit conditions, **such permits may authorize collection of isolated archaeological materials,** not in association with cultural properties, **and limited subsurface testing (e.g. shovel testing)**, as described in BLM Manual Section 8110.22B. Survey and Recordation permits may be issued on a multiple-Field Office or Statewide basis, for extended periods of time, to facilitate Section 106 compliance inventories and surveys. As appropriate, this type of permit may also be used to authorize nonimpacting research projects.

I am certain that the inclusion of this language was deemed appropriate because of the restriction on activities which would amount to "significant disturbance of cultural properties." However, any excavation or collection can be a significant disturbance. The CTUIR CRPP requests that BLM consult with the us regarding all collection and excavation projects they are authorizing whether they believe them to be "significant" or not. The word "significant" is problematic because it is vague and offers no guidance to staff about what is and is not "significant." More importantly, however, tribes are not involved in the decision of what activity they believe is "significant." This is the fundamental problem with the regulations, any restriction or qualifier such as "significantly," "dramatically," or "extensively" gives rise to discretion on the part of the BLM staff who will likely not possess the necessary training to identify impacts to archaeological resources. The CTUIR CRPP has seen fences secured directly to petroglyph panels because the federal agency staff were not aware that a fence could impact archaeological resources. Likewise, many PA's try to exempt fencing from Section 106 review when they can go directly through archaeological sites.

Although the letter requesting consultation was dated August 21, 2008, the CTUIR did not receive it until September 17th, 2008. The CTUIR will require more than 30 days to review the entirety of BLM consultation policies and the existing/proposed Programmatic Agreements between the BLM, Oregon SHPO and the ACHP.

The CTUIR CRPP intends to review the existing PA with the State of Oregon. We are aware that the existing PA is problematic to the Oregon State Historic Preservation Office because BLM does not share concurrences with them, and if BLM does not give SHPO the opportunity to concur in eligibility determinations, there is no NHPA compliance. Further, Oregon SHPO has asked repeatedly to abandon the 1997 PA and negotiate another PA, a request which has been ignored. Finally, it should be noted that the CTUIR is not a party to the PA between the BLM and SHPO. Therefore, it is inappropriate to presume compliance with the PA is consistent with consultation with tribes under the NHPA. Therefore, the CTUIR CRPP still expects the BLM to consult with us under the NHPA and 36 CFR § 800. The NHPA states, "In carrying out it's responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to" "[p]roperties of traditional religious and cultural importance to an Indian tribe . . ." 16 USC 470a(d)(6)(A and B). While an ARPA permit is not an undertaking for the purposes of the NHPA, the CTUIR

expects to be consulted with on all activities which impact historic properties of cultural or religious significance to tribes, as required by the NHPA or ARPA.

Finally, the CTUIR understands that the BLM is under-funded in cultural resource management. I have attached testimony we prepared in 2002 to support funding for the Department of the Interior and offer input on the BLM policy prohibiting reburial on BLM lands (a policy which has since been changed. However, if the BLM does not have the funds to comply with the National Historic Preservation Act, they can not legally carry forward with the undertakings. This may seem an obvious assertion, however we are repeatedly told by agencies that they do not have sufficient funding to comply with the NHPA.

We hope these comments are helpful in the opening stages of revising the BLM Manual. Further we hope that the consultation under these revisions is more productive than the last round of revisions in 2004. Please have your staff contact Audie Huber, Intergovernmental Affairs Manager, Department of Natural Resources, to arrange a formal consultation meeting with BLM. Mr. Huber may be reached at 541-966-2334, or AudieHuber@ctuir.com.

Sincerely,

Teara Farrow Ferman

Teara Farrow Ferman, Program Manager
Cultural Resources Protection Program

CONFEDERATED TRIBES
of the
Umatilla Indian Reservation
Department of Natural Resources
CULTURAL RESOURCES PROTECTION PROGRAM
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Pendleton, Oregon 97801
Area code 541 Phone 276-3629 FAX 276-1966

July 30, 2002

The Honorable Senator Daniel K. Inouye, Chair
Senate Committee on Indian Affairs
Hart Senate Office Building, SH-838
Washington, DC 20510

RE: Oversight Hearing on Sacred Sites Protection by the Department of the Interior

Dear Chairman Inouye and Members of the Committee:

Mr. Chairman and members of the committee, I am Armand Minthorn, member of the Board of Trustees and Chair of the Cultural Resources Commission of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). I offer these comments on behalf of the CTUIR Cultural Resources Committee. I intend to address three issues. First, the cultural resources programs within federal agencies are critically under funded, and this has endangered tribal sacred sites. Second, cultural resources are trust resources, and federal agencies have a Trust Responsibility to protect these sites and resources. Finally, the actions of the Bureau of Land Management (BLM) with regard to NAGPRA implementation have severely curtailed fulfilling the intent behind the legislation by denying a Trust Responsibility to manage these resources and prohibiting reburial of cultural items on BLM lands.

Over the past five years, I have served on the Review Committee established by the Native American Graves Protection and Repatriation Act (NAGPRA). I currently serve as the Chair of that committee. During my service to the tribe as well as the Review Committee, I have witnessed first hand the activities of federal agencies concerning the preservation of Sacred Sites.

Department of the Interior Cultural Resources Funding

Cultural resources represent some of the most sensitive and vulnerable resources in which tribes possess interests. The federal government is the largest individual landowner in the West. Across these vast stretches of land are archaeological sites, traditional cultural properties, burials, and any number of significant religious, cultural and sacred sites. Against

this backdrop, it has become painfully apparent that all federal historic resources protection programs are critically under-funded. These programs are the cornerstone of protecting sacred, archaeological and historic sites throughout the nation.

Laws such as NAGPRA, the Archaeological Resources Protection Act (ARPA) and the National Historic Preservation Act (NHPA) state clearly that the conservation of archaeological, cultural and historical sites is a priority of this nation. To date, however, we have been unable to find sufficient political support to get these resources protected. Agencies often rely upon their myriad legislative mandates to ignore cultural resources in lieu of activities for which they have a line-item in their budgets. This has led to inconsistent application of cultural resource laws between Departments and even within Departments. The Department of the Interior is a good example. While the National Park Service within Interior is the flagship of cultural resource preservation, agencies such as the Fish and Wildlife Service, the Bureau of Reclamation and the Bureau of Land Management have demonstrated neither the experience necessary to adequately implement these laws nor the willingness to give these resources the attention they deserve.

For example, in September, 1999, the Department of the Interior's Office of Inspector General (DOI-OIG) released a report entitled "Cultural Resource Management, Bureau of Land Management." DOI-OIG Report No. 99-1-808. This report concluded that "the Bureau did not adequately survey the public lands to determine the location, nature, and extent of culturally significant sites." The report also noted that this was the same conclusion reached in a 1987 General Accounting Office report and four Office of Inspector General reports issued in 1990 and 1991. In response to those reports, the BLM indicated that it would develop an overall strategy to identify significant sites. The 1999 report indicated that this "overall strategy" had not been implemented. The report stated that "Bureau officials at the offices we visited consistently stated that minimal time was devoted to identifying and protecting cultural sites on the many acres of unsurveyed land that the Bureau manages." From my experience, this pattern applies across many federal departments and agencies.

Only by Congressional action authorizing appropriations for cultural resource protection will federal agencies address take action to fully implement NAGPRA, ARPA, the NHPA and other legal authorities to preserve these resources.

Cultural Resources as Trust Resources

I should explain what I mean when I say "cultural resources." The CTUIR views cultural resources broadly, to include sacred sites, archaeological sites, occupation sites, and burials as well as traditional hunting, fishing and gathering areas, to name but a few. This definition would include "cultural items" as defined in NAGPRA, "archaeological resources" as defined in ARPA and "historic properties" as defined in the NHPA. I will use the term cultural resources to include these resources. It is because the tribes ceded these lands to the United States and the United States still holds title to these lands that the U.S. has a Trust Responsibility to manage cultural resources.

Specifically, there are two primary reasons why cultural resources are Trust Resources for purposes of the Trust Responsibility. First, because human remains are not "property" under common law, federal Indian law or international law, the tribes did not transfer ownership of their ancestors to the United States when they ceded vast tracts of lands. Second, statutes such as the NHPA, ARPA and NAGPRA acknowledge and define the specific responsibilities of federal agencies' management of cultural resources.

Recently, the Department of the Interior attempted to define the scope of "Trust Resources" to which the Trust Responsibility applies. In defining "Trust Assets," the DOI identified only "natural resources" as being within that category without any discussion of cultural resources. This, I believe, was an oversight by DOI when it developed its trust resource policy. One explanation is that tribal traditions dictate that no one "owns" our ancestors, nor are our ancestors "resources" or "assets" within the common definition of the terms. However, merely because cultural resources are difficult to define does not mean that they are subject to some lesser standard of protection than that afforded by the Trust Responsibility. Indeed, cultural resources are so difficult to define because individual tribes can attach different meanings to the term. The tribes, in partnership with agencies such as DOI have an obligation to protect tribal ancestors and sites on lands managed by federal, tribal, state and private owners. It necessary for federal agencies to acknowledge their Trust Responsibility and the obligations it encompasses to protect cultural resources as trust resources.

Under the canons of construction for interpreting Indian treaties, treaties are to be construed liberally, as the tribe would have understood them, with ambiguities resolved in favor of the tribe. County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 269 (1992). The tribes understood that they were granting to the United States certain rights to tribal aboriginal territory. However, the treaty minutes from the Treaty of 1855 clearly indicate that there was no contemplation by the tribes that they were granting title to their sacred sites or to the graves of their ancestors. There was no such grant. Indeed, common law of the time dictated that human remains were not property and therefore could not be conveyed by deed, and descendants retained rights to protect those burials from destruction. When the United States accepted lands ceded by treaty, they acquired the responsibility to protect these tribal graves in trust for the culturally affiliated tribes.

Further, cultural resources are subject to the Trust Responsibility because Congress has specifically legislated that tribal rights in these resources must be protected. Congress implicitly recognized in ARPA tribal interests in sacred and archaeological sites. ARPA requires that when a permit is requested, the "Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance." 16 U.S.C. 470cc(c). ARPA also requires that regulations implementing ARPA "may be promulgated only after consideration of the provisions of the American Indian Religious Freedom Act (92 Stat.469; 42 U.S.C. 1996)."

Furthermore, both NHPA and NAGPRA acknowledge the significance of these sites to tribes and require consultation with tribal governments regarding them. The NHPA requires all federal agencies to establish a historic preservation program in consultation with Indian

tribes. 16 U.S.C. § 470h-2(a)(2)(D). The statute also requires the Secretary of the Interior to develop guidelines for plans to "encourage the protection of Native American cultural items" and "of properties of religious or cultural importance to Indian tribes[.]" 16 U.S.C. § 470h-4(b)(3). These guidelines should also "encourage owners who are undertaking archaeological excavations" to give notice to and consult with an Indian tribe which may have an interest in a cultural item under NAGPRA "prior to excavating or disposing of a Native American cultural item[.]" 16 U.S.C. § 470h-4(b)(4)(D).

NAGPRA was the first statute to elaborate upon the precise responsibilities of federal agencies and museums when Native American graves, human remains and sacred items are at issue. The law contemplates the repatriation of all Native American human remains which are or can be culturally affiliated. Additionally, NAGPRA only allows the excavation of Native American human remains after consultation with the "appropriate Indian Tribe." 25 U.S.C. § 3002(c). It was NAGPRA which finally proclaimed that tribes retain the same rights to protect their ancestors' graves as non-Indians do.

In practice, when items are unearthed, either intentionally or unintentionally, NAGPRA requires that a process be implemented to determine to whom the items are culturally affiliated and when repatriation should occur. In the interim, between the time that the remains are determined to be Native American and ultimate repatriation, the United States Department of Justice (USDOJ) has taken the position that they hold human remains in trust for the culturally affiliated tribe(s). This has been the consistent position of the USDOJ in the Ancient One (AKA "Kennewick Man") litigation. Lastly, in a letter from the Department of the Interior to Congress regarding the bill which eventually became NAGPRA, Deputy Assistant Secretary Scott Sewell stated,

> Although the Federal government legally owns human remains, it is our position that the government should have only stewardship responsibilities for human remains and other cultural items which should be held in trust for culturally affiliated groups who can establish rights to their ownership and for the scientific and educational benefits derived from some of these cultural items.
>
> H. Rep. 101-877, reprinted in 1990 U.S.C.C.A.N. 4367, 4389.

This letter acknowledges that human remains should be considered trust resources and encouraged Congress to recognize the line between "ownership" and "possession or control." NAGPRA made clear in its plain language that "possession or control" was the appropriate legal distinction for the Native American human remains in federal custody, rather than ownership.[1] In this, the purest legal sense, cultural resources are "trust resources" because the United States holds title to the lands on which they are located, and the tribes which are culturally affiliated to those resources retain legally protected interests in those items by way of NAGPRA, ARPA, NHPA, treaties, executive orders and other laws and agreements.

[1] The USDOJ has argued that items stolen from Native American graves are property of the United States for the limited purposes of ARPA prosecutions and sentencing guidelines. Prior to 2002, ARPA crimes had no specific sentencing guidelines, other than the general theft guidelines.

BLM Cultural Resource Protection Policies

Several cultural resource issues have arisen with the Bureau of Land Management. Most significantly, the BLM adopted a policy in 1996 that prohibited reburial of repatriated human remains and other NAGPRA items on public lands. This upset the tribes because few sites are more sacred than the graves of our ancestors. As this Committee is well aware, tribal ancestors around the country were routinely excavated by federal agencies, museums, and archaeological looters. The passage of NAGPRA in 1990 sought to end this serious injustice, yet even today, federal agencies such as the BLM frustrate NAGPRA by denying tribes the ability to rebury our ancestors in their original graves.

The CTUIR has a policy of reburying our ancestors as close to where they were originally buried as possible. This is a policy rather than a tradition, because traditionally we did not excavate burials and thus did not have reburials. We have worked with various federal agencies to address the tribal policy to rebury on federal lands with varying degrees of success. Recently the Corps of Engineers expressed the belief that the language in the 2000 Water Resources Development Act, which allowed reburials on Corps property for remains from project lands, actually restricted their reburial authority. That is to say, the Corps would not allow reburial of remains taken from lands which were not "project lands" at the time of excavation, but which later became "project lands." Thankfully, other agencies such as the Forest Service have adopted policies which allow reburials on their lands in consultation with the agency. The decision of the Forest Service to allow these reburials is a strong step towards healing the wounds created by the removal of our ancestors.

In 1996, BLM took the unilateral position that reburials would not be allowed on BLM lands. Later, on July 1, 1998, the Director of the BLM issued Instruction Memorandum No. 98-131 (IM 98-131), which states in relevant part:

> Due to the substantial and extensive legal, logistical, and practical problems that would ensue if human remains and other "cultural items" repatriated or transferred to lineal descendants or tribes were to be reburied on public land, the Bureau's [BLM] existing policy, in place since 1996, is reaffirmed and clarified:
>
> **The BLM's managers shall not directly or indirectly authorize or permit the reburial of repatriated, removed, or transferred human remains and/or other NAGPRA materials, on public lands.**
>
> (emphasis in original)

This policy substantially limits the ability of the tribes to consult with BLM on NAGPRA matters because many tribes wish to rebury their ancestors as close as possible to their original burial. The legal position of BLM, as I understand it, is that NAGPRA transfers absolute ownership of cultural items to a tribe and therefore the legal responsibility of the agency for those remains is at an end when they are repatriated. BLM apparently does not

want to accept the responsibility for repatriated items on their lands. Additionally, both IM 98-131 and IM 98-132 state that NAGPRA materials and other archaeological resources are **not** "trust assets" and are thus **not** subject to the Trust Responsibility.

In May, 2000, the DOI-OIG released a report entitled "Native American Graves Protection and Repatriation Activities, Bureau of Land Management." DOI-OIG Report No. 00-I-377, May 2000. The report described general compliance with NAGPRA, but it did find that BLM staff had allowed reburials on public lands, thus ignoring the Instruction Memorandum 98-131. Colorado BLM officials indicated that "they believed BLM's prohibition of public land reburials was impeding the NAGPRA consultation process and that it reduced BLM's ability to repatriate NAGPRA remains to tribes because some tribes wanted the remains to be reburied near the original burial sites (on public land)." The report goes on to justify prohibiting reburials on public lands because, once repatriated, cultural items become the "personal property" of the tribe and are thus no longer protected by ARPA. This assertion is blatantly false. ARPA applies to all "archaeological resources" on public lands which are over 100 years old and are of archaeological interest.

BLM is in the process of revising the BLM Manual as it relates to cultural resources. All indications are that BLM will be fully incorporating the Instruction Bulletin guidance that prohibits NAGPRA reburials and denies the Trust Responsibility to protect cultural resources. This revision to the BLM Manual is being conducted without any consultation with tribal governments. Failure to consult with tribal governments when policies are being developed affecting them is inconsistent with the general Trust Responsibility, Executive Order 13175, and the April 29th, 1994, Memorandum to the Heads of Executive Departments and Agencies regarding Government-to-Government Relations with Native American Tribal Governments. Both the Executive Order and the 1994 Memorandum require consultation with tribal governments. Specifically, the 1994 Memorandum states:

> In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:
>
> (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
>
> (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
>
> (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.

Executive Order 13175, which supplemented the 1994 Memorandum, § 5 requires that "[e]ach agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." To

revise the guiding documents whereby the BLM implements NAGPRA, ARPA and the NHPA without tribal consultation is a breach of the Trust Responsibility and many other statutory and legal mandates the BLM has.

Conclusion

The United States undertook the duty to manage tribal resources when it entered into the government-to-government relationship with individual tribes through treaties, statutes and executive orders. When the U.S. accepted millions of acres of land from the tribes, it accepted the responsibility to manage these cultural resources in trust for the culturally affiliated tribes and tribal members. Cultural resources, including sacred sites, deserve more than lip-service of federal agencies. Until agencies accept that they have a Trust Responsibility to protect these sites and resources, tribal interests will continue to take a back seat to other agency responsibilities.

Finally, the BLM and other agencies should either recognize their responsibilities to allow reburials or be granted that authority from Congress. Simply put, the tribes did not create the "problem" of repatriation and reburial of ancestral human remains. The United States did when it directed, permitted or allowed the excavation of our tribal ancestors. We are only trying to rectify a wrong committed over the last three centuries. Is it too much to ask that we be allowed to rebury our ancestors as close to their original burial location as possible? The BLM would say yes. Should we have to beg to rebury our ancestors only to be told no? I submit to you today that only through consultation, even if it must be Congressionally mandated consultation, can we, together, resolve the protection of our cultural resources.

Sincerely,

Armand Minthorn, Chair
Cultural Resources Committee
Member, Board of Trustees

Cc: BOT/CRC/CRPP

"Cultural Resources Department" <cultres@nemontel.net>
02/05/2010 07:47 PM

To <Robin_Burgess@blm.gov>
cc <littlego_172_1951@hotmail.com>, <brhodd1@yahoo.com>, "Christensen, Robert C." <rchriste@nd.gov>, <esevone1@yahoo.com>, <zihe2000@hotmail.com>,
bcc
Subject Re: In response to your question.

History: This message has been replied to and forwarded.

Dear, Robin L. Burgess, Ph.D.

Our contributions to the US Government have always been one of trust and acceptance, acceptance and trust. Since Treaty making times, the Tribes have understood that a public policy is a deliberate and careful assessment that provides guidance for addressing selected public concerns. Tribes look at Policy development as a decision making process that helps address identified goals and problems or concerns. Tribes believe that in the spirit of change, policy development must cause the selection of a destination or desired benefit. With that said, the actual formulation of a consultation policy should involve the identification and analysis of a range of actions that respond to these concerns. Every possible solution must be assessed against a number of factors such as probable effectiveness, budgetary cost, resources required for implementation, political context and Tribal support. We understand that BLM's reluctance in the past to include a Tribal Consultation Budget was based on its own uncertainties. Perhaps now we can get a glimpse at what BLM is preparing as a budget and begin the necessary dialogue to overcome reoccurring old themes and barriers.

Consultation itself plays a critical role in the Government-to-Government policy process. Maintaining clear considerations between policy making and Indians Affairs creates the investigation of truth through discussion needed to ensure policy ideas are rigorously tested and adapted in light of evidence. These should continue and be maintained. However, there are a number of issues for believing that there are some ongoing disparities in policy interpretation of both policy makers (decision maker) and field office officials/managers. Further, strategies for greater engagement with Indian Tribes can create greater opportunities for Indian Tribes to increase value – either through identifying ways in which policies and programs can change, or assisting in identification of different and better approaches. This approach can offer a beginning for policy makers keen to seize such opportunities to consider how they can design processes to meet American Indian needs. Bringing the policy maker and American Indian perspectives

to bear, considerations should include what might be required for Best Practice at each point along the continuum.

The Bureau of Land Management (BLM) has acknowledges the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. In that context, the trust responsibility relates to the United States' unique legal and political relationship with Indian tribes. Congress, with plenary power over Indian affairs, plays a primary role in defining the trust responsibility, and Congress recently declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601.

The term "trust responsibility" is also used in a narrower sense to define the precise legal duties of the United States in managing prosperity and resources of Indian tribes and, at times, of individual Tribal members.

The trust responsibility, in both senses, is intended to guide the BLM in litigation, enforcement, policymaking and proposals for legislation affecting Indian Tribes, when appropriate to the circumstances. As used in its narrower sense, the federal trust responsibility is capable of being settled in court in some circumstances, while in its broader sense the definition and implementation of the trust responsibility is committed to Congress and the Executive Branch.

Your conversation with me regarding the BLM; tribal consultation outreach effort is most appreciated. I believe most of the tribes understand why this action was initiated, but how Tribes will prepare themselves to engage with BLM to ensure that they understand as far as possible all the relative features of the agency's organizational, strategic and political context is unclear. US Policy on Indian Affairs can also be categorized as reactive or proactive. Reactive policy generally emerges in response to a concern or crisis that must be addressed – those generally include health related emergencies or governmental failures are two examples.

Proactive policies, in comparison, are introduced and pursued through deliberate choice. Knowledge and learning more and more have been recognized by Tribes as vital keys that unlock the doors to both economic wealth and social well-being. Yet, it seems we have always had to flush out any solutions in policy development aimed at tribes and to clarify perceptions about the expected usefulness of the policy and processes it might impact.

Without the opportunity to discuss these issues, my concerns have are changed to suggestions:

Can we have a round table discussion to include the Secretary of

Interior, agency heads, legal representatives and Tribes for the emotional dynamics of reconstruction?

Why is there not an open line of inquiry questions and comments publicly posted for Tribes on alternative approaches, and suggestions for specific changes or improvements of policy development?

BLM needs to be clear with Tribes about priorities for their action or change, based on the findings and relative to strategic opportunities;

Tribes need to explore the degree of coherence between BLM's declared development co-operation goals and its preservation and tribal support policy;

Tribes need solution based discussions that address mitigation failure with BLM policy makers on alternative courses of action, based on the evidence gathered.

Thanks for asking for my comments.
Curley Youpee

COQUILLE INDIAN TRIBE

P.O. Box 783 • 3050 Tremont • North Bend, OR 97459
Telephone 541-756-0904 • FAX 541-756-0847

February 8, 2010

Stan McDonald
Cultural Resources and Tribal Relations Programs
Bureau of Land Management-Oregon State Office
333 SW 1st Avenue
Portland, OR 97208

Dear Stan McDonald:

The Coquille Tribe has received and reviewed the documents your office recently provided regarding proposed revisions to the Programmatic Agreement for Compliance with the National Historic Preservation Act. The proposed revisions are satisfactory to our interests.

Thank you for the opportunity to comment.

Sincerely,

Ed Metcalf
Chairperson

L61110.1871

NATHPO
NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS
P.O. Box 19189 • Washington, D.C. 20036-9189 • Phone: (202) 628-8476 • Fax: (202) 628-2241 • www.nathpo.org

March 1, 2010

VIA E-MAIL (robin_burgess@blm.gov)

Dr. Robin Burgess
BLM Preservation Officer
U.S. Department of the Interior
Bureau of Land Management
1849 C Street, NW
Mail Stop 204-LS
Washington, D.C. 20240

Re: Comments on Proposed Revision to 1997 Programmatic Agreement Regarding the Manner in Which BLM Will Meet Its Responsibilities Under the National Historic Preservation Act 74 Fed. Reg. 68,862 (Dec. 29, 2009)

Dear Dr. Burgess:

The National Association of Tribal Historic Preservation Officers (NATHPO) submits the following comments on the proposed revision to the Bureau of Land Management's 1997 National Programmatic Agreement (National PA) with the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers, regarding the manner in which BLM meets its responsibilities under the National Historic Preservation Act.

As has been noted by the National Trust for Historic Preservation, the BLM must revise the National PA and the associated state protocols in order to bring those agreements into compliance with the regulations implementing Section 106 of the National Historic Preservation Act (NHPA). The National PA and most of the state protocols are not consistent with the current Section 106 regulations, and therefore, do not comply with Section 110(a)(2)(E)(i) of the NHPA, 16 U.S.C. § 470h-2(a)(2)(E)(i). The Section 106 regulations were completely overhauled in 1999 and 2000 in order to implement the 1992 amendments to the NHPA. One of the most fundamental issues addressed in the 1992 NHPA amendments was the role of tribal governments and Tribal Historic Preservation Officers (THPOs) under Section 106 [65 Fed. Reg. 77,698-99 (Dec. 12, 2000)]. The failure of the National PA to address tribal consultation is a major deficiency of BLM's preservation program that has existed for more than a decade. Although BLM's position is that the National PA "does not alter" BLM's tribal consultation responsibilities, 74 Fed. Reg. at 68,863 (Dec. 29, 2009), the reality is that tribal consultation has long been treated as an afterthought because it is not integrated into the National PA and must be corrected.

Recommendations:

1. We are concerned about the approach to tribal consultation outlined in the draft revision strategy, which includes how BLM proposes to develop several "layers" of agreements and protocols, some of

which will govern consultations for entire programs or states, while others will govern interactions with individual Indian tribes. It is not immediately clear how these agreements will interact, and how they will ultimately ensure that tribes are provided with adequate notice of proposed undertakings and opportunities to participate in consultation with BLM. Multiple "layers" of agreements and protocols will complicate and dilute, rather than strengthen, the role of Indian tribes in the Section 106 process, and will discourage rather than encourage meaningful tribal consultation.

2. We are concerned about the continued use of tribal listening sessions as a mechanism for consulting with Indian tribes. Tribal listening sessions do not replace the kind of individualized consultation with tribes that Section 106 envisions regarding the unique effects of specific undertakings on properties of religious and cultural significance. Moreover, the broad brush, listening-session approach to consultation fails to acknowledge the distinct preferences and unique circumstances of individual tribes.

3. We encourage BLM to require its state and field offices to designate points of contact for Indian tribes, and to direct those officials to conduct regular meetings with tribes or groups of tribes in addition to coordinating Section 106 consultations. The National Park Service's recently updated Nationwide Programmatic Agreement currently contains such a requirement, which we understand has greatly enhanced the role of tribes in the Section 106 process. Additionally, we encourage BLM to provide tribes with regular schedules of actions that are under consideration, as the U.S. Forest Service currently does.

4. BLM must provide tribes, interested parties, and the public with the opportunity to provide input on proposed revisions and amendments to the state protocols. Of additional concern, the state protocols currently permit BLM and the SHPOs to amend the agreements without seeking and considering input from interested parties, the public or tribes. *See, e.g.*, ID Protocol at 8; CO Protocol at 12. This lack of consultation with any interested parties runs directly counter to the Section 106 regulations, which specifically require BLM to seek public input and consult with tribes over the development of alternate compliance procedures. 36 C.F.R. § 800.14(a)(1). Furthermore, to the best of our knowledge, BLM has never provided notice of the availability of any of the state protocols (draft or final) in the Federal Register, as required by the Section 106 regulations. *Id.* Consequently, BLM must fully engage not only the SHPOs, but also the tribes and other interested parties in the process of revising the state protocols and provide the public with notice of the proposed revisions in the Federal Register.

5. We also recommend that BLM consider changing the composition of the Preservation Board to include representatives from other signatories of the National PA, tribes and other interested groups. The Preservation Board could even take a similar approach to BLM's Resource Advisory Councils in terms of its composition. Such an approach was suggested in the reports of the tribal listening sessions, which indicated an interest in including tribal representation on the board.

Please let me know if you have any questions or need additional information. NATHPO would be happy to meet with you and other BLM representatives to discuss this process and future steps.

Sincerely yours,

Reno Franklin, Kashia Band Pomo THPO and
NATHPO General Chairman

Alexander Hays
<Alexander_Hays@nthp.org>

03/01/2010 11:33 PM

To "robin_burgess@blm.gov" <robin_burgess@blm.gov>

cc "rnelson@achp.gov" <rnelson@achp.gov>, "Caroline D. Hall" <chall@achp.gov>, Nancy Brown <nbrown@achp.gov>, "schamu@sso.org"

bcc

Subject NTHP Comments on Proposed Revisions to BLM's National PA

Dear Robin:

On behalf of the National Trust, please accept these comments on the proposed revisions to BLM's National PA. Please let me or Betsy Merritt (betsy_merritt@nthp.org) know if you have any questions about our comments.

Regards,

Ti Hays

Alexander "Ti" Hays V | Public Lands Counsel, Law Department
National Trust for Historic Preservation | 535 16th Street, Suite 750, Denver, CO 80202
Phone: 303.623.1504 | Fax: 303.623.1508 | Email: alexander_hays@nthp.org |
www.PreservationNation.org

NTHP Comments, Proposed Revisions to BLM National PA, Mar. 1, 2010.pdf

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DEPARTMENT

March 1, 2010

VIA E-MAIL (robin_burgess@blm.gov)

Dr. Robin Burgess
BLM Preservation Officer
U.S. Department of the Interior
Bureau of Land Management
1849 C Street, NW
Mail Stop 204-LS
Washington, D.C. 20240

Re: Comments on Proposed Revision to 1997 Programmatic Agreement Regarding the Manner in Which BLM Will Meet Its Responsibilities Under the National Historic Preservation Act
74 Fed. Reg. 68,862 (Dec. 29, 2009)

Dear Dr. Burgess:

Thank you for the opportunity to comment on the proposed revision to the Bureau of Land Management's 1997 National Programmatic Agreement (National PA) with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, regarding the manner in which BLM will meet its responsibilities under the National Historic Preservation Act (NHPA). For several years, the National Trust for Historic Preservation has actively pushed BLM to revise the National PA and the associated state protocols in order to bring those agreements into compliance with the regulations implementing Section 106 of the NHPA. Even if BLM considered the National PA to be consistent with the previous Section 106 regulations at the time it was signed in 1997, the National PA and the state protocols are *not* consistent with the current Section 106 regulations, and therefore, do not comply with Section 110(a)(2)(E)(i) of the NHPA, 16 U.S.C. § 470h-2(a)(2)(E)(i).

As you know, the Section 106 regulations were completely overhauled in 1999 and 2000 in order to implement the 1992 amendments to the NHPA. One of the most fundamental issues addressed in the 1992 NHPA amendments was the role of tribal governments and Tribal Historic Preservation Officers (THPOs) under Section 106. 65 Fed. Reg. 77,698-99 (Dec. 12, 2000). As a result, the failure of the National PA to address tribal consultation has been a major deficiency of BLM's preservation program for more than a decade. Although BLM's position is that the National PA "does not alter" BLM's tribal consultation responsibilities, 74 Fed. Reg. at 68,863 (Dec. 29, 2009), the reality is that tribal consultation has long been treated as an afterthought by BLM, because it is not integrated into the procedures established under the National PA. Thus, we commend BLM for taking the initial steps to implement the agency's tribal consultation responsibilities and make other, long-overdue changes to the National PA.

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P 202.588.6000 F 202.588.6038 E info@nthp.org www.PreservationNation.org

Interests of the National Trust

As you know, the National Trust has long been involved in the protection of cultural resources on our nation's public lands, including those managed by the Bureau of Land Management. In 2006, the National Trust issued a report, "*Cultural Resources On the Bureau of Land Management Public Lands: An assessment and needs analysis*," available online at http://www.preservationnation.org/issues/public-lands/additional-resources/NTHP-BLM-Report.pdf, which identified several challenges facing the agency in the management of cultural resources and offered a variety of recommendations on how to address those challenges.

I. BLM Must Address Tribal Consultation in the National PA Revision.

We compliment BLM for taking the critical first step toward elevating the role of Indian tribes in the Section 106 process by hosting a number of tribal listening sessions over the summer. However, as the BLM Director pointed out in his recent Instruction Memorandum to the State Directors, the listening sessions represent only the first step in what may prove to be a long and somewhat complicated process for the agency. IM 2010-037 (Dec. 18, 2009). As BLM knows, tribes may have divergent expectations of what constitutes "good faith" consultation. Consequently, the difficult task now facing BLM is how to revise the National PA in a manner that both respects and responds to those differences.

We have a number of concerns about the approach to tribal consultation outlined in the draft revision strategy. First, the draft revision strategy proposes to develop several "layers" of agreements and protocols, some of which will govern consultations for entire programs or states, while others will govern interactions with individual tribes. It is not immediately clear how these agreements will interact, and how they will ultimately ensure that tribes are provided with adequate notice of proposed undertakings and opportunities to participate in consultation with BLM. In general, we are concerned that multiple "layers" of agreements and protocols will complicate and dilute, rather than strengthen, the role of Indian tribes in the Section 106 process, and will discourage rather than encourage meaningful tribal consultation.

Second, we are concerned about the continued over-reliance on tribal "listening sessions" as a mechanism for consulting with Indian tribes. Tribal listening sessions cannot substitute for the kind of individualized consultation with tribes that Section 106 envisions regarding the unique effects of specific undertakings on properties of religious and cultural significance. Moreover, the group listening sessions fail to address the distinct preferences and unique circumstances of individual tribes.

Finally, we encourage BLM to require its state and field offices to designate points of contact for Indian tribes, and to direct those officials to conduct regular meetings with tribes in addition to coordinating Section 106 consultations. The National Park

Service's recently updated Nationwide Programmatic Agreement currently contains such a requirement, which we understand has greatly enhanced the role of tribes in the Section 106 process. Additionally, we encourage BLM to provide tribes with regular schedules of actions that are under consideration, as the U.S. Forest Service currently does.

II. BLM Should Substantially Expand the Role of Consulting Parties and the Public in the National PA.

One of BLM's goals for the National PA revision is to "[c]larify the role of consulting parties and expectations for public outreach processes, including integration of the NHPA and National Environmental Policy Act [NEPA] requirements. . . ." 74 Fed. Reg. at 68,863. We strongly believe that the role of consulting parties should not merely be *clarified*, but should be substantially expanded. In many cases, it has been extremely difficult to convince BLM to involve consulting parties *at all* in Section 106 review, notwithstanding the National PA. The challenge is for BLM to overcome a long-standing agency culture under which consulting parties are routinely excluded, marginalized, or erroneously grouped with the general public. A major goal of the revision should be to help the agency overcome this bias by requiring BLM staff and local offices to seek and actively involve consulting parties as required under 36 C.F.R. § 800.3(f).

BLM must also address the distinctions between involving the "public" through the National Environmental Policy Act (NEPA) process and engaging consulting parties in the Section 106 process. We are aware of several situations in recent years where BLM field offices have treated the concepts of "consulting parties" and the broader "public" as though they were interchangeable, when in fact the Section 106 regulations clearly distinguish between them in 36 C.F.R. § 800.2(c)(5) and (d). For example, in 2003, BLM refused to allow the National Trust, as well as several other interested groups, to participate as consulting parties in connection with the West Tavaputs Plateau natural gas drilling project in Utah, despite our years of advocacy for the protection of Nine Mile Canyon. BLM expressly stated that the National Trust and other interested parties would only be allowed to provide input through the thirty-day NEPA commenting period. Letter from Patrick Gubbins, Price Field Office Manager, BLM, to Michael Smith, Public Lands Counsel, National Trust (Oct. 9, 2003) (Attachment 1). While we understand that the Section 106 regulations permit the use of the NEPA process to facilitate public involvement, 36 C.F.R. § 800.2(d)(3), the regulations certainly do not intend for agencies to use the NEPA process as a way to preempt or substitute for the involvement of Section 106 consulting parties altogether. In fact, the regulations explicitly direct federal agencies to seek out consulting parties and invite them to participate in consultation. *Id.* §§ 800.3(f), 800.8(c)(1)(i), (iii).

Finally, the National PA must require compliance with the documentation standards of 36 C.F.R. § 800.2(d) and § 800.8 when BLM chooses to coordinate the Section 106 process with the NEPA process. We frequently review EAs and EISs that lack

even the most basic information about cultural resources and the Section 106 process, such as a description of the project's area of potential effects. By failing to include this required information in NEPA documents, BLM often limits the public's ability to provide meaningful input regarding potential impacts on historic properties.

III. Phased Compliance Should Ensure More Timely Consideration of Cultural Resources.

The National Trust supports BLM's proposed goal of "integrat[ing] the concept of phased Section 106 compliance into the PA." 74 Fed. Reg. at 68,863. However, we stress the importance of accomplishing this goal in a manner that complies with the requirements of the Section 106 regulations. In our experience, BLM has often used phased identification and evaluation efforts to improperly defer all or much of the analysis of cultural resource impacts to a time that is far too late in the review process—*i.e.*, after BLM has made an "irrevocable commitment of resources." *See New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), *rev'd on other grounds*, 565 F.3d 683 (10th Cir. 2009) (the "most significant point in the process as far as NHPA is concerned" is when "BLM makes an irrevocable commitment of resources").

We frequently see these violations in the context of the oil and gas leasing program when BLM defers final identification of historic properties until after leases have been issued, even for parcels that have not been adequately inventoried for historic properties, or when consultation with tribes about properties of religious or cultural significance is incomplete or missing. Once BLM issues a lease (or makes some other kind of "irrevocable commitment of resources"), it typically loses the "ability to consider all means of mitigation, including a ban on any disturbance of the leased parcel," particularly for landscape-level cultural resources, such as traditional cultural properties. *Id.*. This practice is fundamentally inconsistent with the Section 106 regulations, which specifically require federal agencies to avoid taking actions that "restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties." 36 C.F.R. § 800.1(c). Thus, while we generally support integrating the "phasing" concept into the National PA, we caution BLM that it must do so in a way that preserves the agency's ability to consider a full range of avoidance and mitigation measures at each stage in the planning process.

- **Ensure that the SHPO, tribes, and interested parties have been adequately consulted prior to "irrevocable commitments of resources."** While BLM should consult with the SHPOs, tribes, and interested parties at every stage in the planning process, consultation is particularly important prior to issuing a lease or otherwise conveying development rights. As the Section 106 regulations make clear, BLM must evaluate whether adequate consultations and field investigations have taken place during phased identification and evaluation efforts. 36 C.F.R. § 800.4(b)(2). We believe that this evaluation must occur before BLM makes an "irrevocable commitment of resources,"

after which time the agency may no longer have the ability to consider the full range of measures to "avoid, minimize or mitigate" adverse effects. Furthermore, we believe that, if BLM determines that additional consultations or field investigations are necessary for a particular site, as a result of this evaluation, then development rights to that area should not be conveyed.

- **Prepare and provide consulting parties with site-specific cultural resources information, as appropriate, prior to making "irrevocable commitments of resources."** BLM should direct its state and field offices to prepare site-specific cultural resource reports prior to issuing leases or otherwise making an "irrevocable commitment of resources." Not only has the IBLA consistently upheld phased identification and evaluation efforts when BLM prepared such reports, *see, e.g., The Mandan, Hidatsa & Arikara Nation*, 164 IBLA 343, 349-50 (2005), but the Secretary of the Interior recently called for such an approach in the Interior Department's new oil and gas leasing policy, which includes a commitment to conducting "[c]omprehensive interdisciplinary reviews that take into account site-specific considerations for individual lease sales. . . ." U.S. Dept. of the Interior Press Release, "*Secretary Salazar Launches Onshore Oil and Gas Leasing Reforms to Improve Certainty, Reduce Conflicts and Restore Balance on U.S. Lands*" (Jan. 6, 2010), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-Launches-Onshore-Oil-and-Gas-Leasing-Reforms.cfm (last visited Feb. 16, 2010). Furthermore, BLM has an affirmative obligation under NEPA and the Federal Land Policy and Management Act to determine whether an area contains "fragile," "important," and "powerful countervailing environmental values," prior to issuing leases or approving development proposals. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 711 (10th Cir. 2009). Thus, developing site-specific cultural resource reports and sharing those with consulting parties, as appropriate, would further the Secretary's new policy as well as comply with the Tenth Circuit's decision in the *Richardson* case.

- **Stipulations and other conditions developed during phased identification and evaluation efforts cannot replace the duty to consult.** In the past, BLM has sometimes avoided consultation over oil and gas lease sales by attaching "stipulations" to proposed leases that defer consultation, as well as additional identification and evaluation efforts, to the development stage. Federal courts have struck down this practice, however, and have ordered BLM to consult at the leasing stage, regardless of whether BLM includes protective stipulations on its leases. *See, e.g., Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1152 (D. Mont. 2004) ("The process of identifying properties and consulting with affected tribes as well as members of the public is the goal sought by the statute. Lease stipulations do not accomplish the same goal. . . ."). Thus, while we fully support the development and inclusion of protective stipulations during the "phasing" process, BLM must nonetheless consult with all necessary parties at each stage in this process. After all, "it is conceivable that different

lease stipulations would evolve from a larger discussion of possible effects" with consulting parties. Id. 1152-53.

IV. BLM Must Revise the State Protocol Agreements In A Manner Consistent with the Purpose and Intent of Section 106.

A. BLM must ensure that revisions to the state protocols are consistent with the Section 106 regulations.

To ensure consistency between the state protocols and the Section 106 regulations, BLM must include criteria in the National PA to govern the state protocol revisions. As BLM is aware, alternate procedures for complying with Section 106, such as the state protocols, must be consistent with the Section 106 regulations. 16 U.S.C. § 470h-2(a)(2)(E)(i); 36 C.F.R. § 800.14(a); *see also CTIA - The Wireless Ass'n v. FCC*, 466 F.3d 105, 107 (D.C. Cir. 2006). Nevertheless, many of the state protocols do not comply with this fundamental requirement and are inconsistent with the Section 106 regulations in a number of significant ways. For this reason, BLM must do more than simply develop a timetable for revising the state protocols, as proposed in the draft revision strategy. Instead, it must develop specific, mandatory criteria to ensure that the revised protocols are consistent with the Section 106 regulations.

- **State protocols may only exempt undertakings from the Section 106 process if they have "no potential to cause effects" on historic properties.** Under the Section 106 regulations, federal agencies may exempt undertakings from the Section 106 process only when they have "no potential to cause effects" on historic properties. 36 C.F.R. § 800.3(a)(1); *Save Our Heritage v. FAA*, 269 F.3d 49, 62 (1st Cir. 2001). This authority is "categorical" in nature, meaning that the undertaking must be a "type of activity" that will not, under any circumstance, affect historic properties. *Escalante Wilderness Project v. BLM*, 176 IBLA 300, 312 (2009). However, many of the state protocols contain exemptions for types of activities that BLM has acknowledged have the potential to affect historic properties, even adversely. For example, the New Mexico Protocol Agreement contains an exemption for "ORV closures or designations limited to existing roads and trails. . . ." NM Protocol at 36; *see also* WY Protocol App. B at 1 (same); OR Protocol at 16 (same). Yet, in 2007, BLM issued an Instruction Memorandum in which the agency expressly acknowledged that the designation of "existing roads and trails" has the potential to affect historic properties, particularly when those designations "will shift, concentrate or expand travel onto other existing routes or into areas that are likely to have historic properties. . . ." IM 2007-030 *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-030__.html (last visited Feb. 17, 2010). Similarly, the California Protocol Agreement exempts the issuance of special recreation permits from the Section 106 process, CA Protocol App. D at 7, even though BLM regularly conducts Section 106 reviews prior to approving such permits. *See, e.g.*, BLM, Environmental Assessment

UT-090-07-10, Permitted Jeep Use of Arch Canyon and the Hotel Rock Area 4, 26 (2007) (documenting consultation with Utah SHPO regarding effects of Special Recreational Use Permits for Arch Canyon, UT) (Attachment 2).

- **State protocols must require consultation with SHPOs, tribes, and other interested parties regarding "no effect" determinations.** In addition to exempting specific types of activities from the Section 106 process that have the potential to affect historic properties, some of the state protocols improperly allow BLM to make "no effect" determinations without notifying and engaging in consultation with the SHPOs or other interested parties. *E.g.*, NM Protocol at 15; UT Protocol at 4. Such unilateral decision making authority circumvents a central requirement of the Section 106 regulations that BLM "*shall involve* the consulting parties . . . in findings and determinations made during the Section 106 process." 36 C.F.R. § 800.2(a)(4) (emphasis added); *see also id.* § 800.5(a) (the agency must "consider any views concerning . . . effects which have been provided by consulting parties . . . .").

- **BLM must allow tribes, interested parties, and the public the opportunity to provide input on proposed revisions and amendments to the state protocols.** Of additional concern, the state protocols currently permit BLM and the SHPOs to amend the protocol agreements without seeking or considering input from tribes, interested parties, or the public. *See, e.g.*, ID Protocol at 8; CO Protocol at 12. This lack of consultation with any interested parties is in direct conflict with the Section 106 regulations, which specifically require BLM to seek public input and consult with tribes over the development of alternate compliance procedures. 36 C.F.R. § 800.14(a)(1). Furthermore, to the best of our knowledge, BLM has never published notice of the availability of any of the state protocols (draft or final) in the Federal Register, as required by the Section 106 regulations. *Id.* Consequently, BLM must fully engage not only the SHPOs, but also the tribes and other interested parties in the process of revising the state protocols, and must provide the public with notice of the proposed revisions in the Federal Register.

- **BLM must submit proposed state protocol revisions to the Advisory Council for a consistency determination.** BLM must submit "alternate procedures to the Council for a 60-day review period," during which time the Council will determine whether the proposed procedures are consistent with the Section 106 regulations. 36 C.F.R. § 800.14(a)(2). Perhaps because the Section 106 regulations lacked this requirement in 1997, BLM never provided the Advisory Council a formal opportunity to review and comment on the state protocols, which may explain why they are inconsistent with the Section 106 regulations in so many significant ways. In order to avoid such inconsistencies in the future, BLM must submit the revised protocols to the Advisory Council for the mandatory consistency determination.

B. BLM must follow the standard Section 106 regulations until the state protocols are revised and conform to the Section 106 regulations.

In light of their numerous inconsistencies with the Section 106 regulations, the state protocols cannot serve as alternate procedures for complying with Section 106, and BLM must instead follow the standard Section 106 regulations. Federal courts, as well as the IBLA, have repeatedly struck down efforts to rely on alternate procedures that are inconsistent with the Section 106 regulations. *See, e.g., Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (rejecting as "contrary to the letter and spirit of the [Section 106] regulations" alternate procedures that lacked a requirement for consultation with the SHPO over effects determinations); *Escalante Wilderness Project*, 176 IBLA at 313 (stating that inconsistent "BLM compliance procedures would revert back to those in the ACHP regulations"); *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 791-92 (N.D. Ohio 2001) (Army Corps cannot rely on its own regulations to determine compliance with NHPA because the Corps' regulations are inconsistent with the Advisory Council's Section 106 regulations). Thus, we strongly disagree with BLM's proposal to "maintain operation of the . . . state-specific protocols until the revised agreement is fully in effect." National PA Revision Strategy at 3. Instead, BLM must follow the standard Section 106 regulations until the protocols are revised.

V. The National PA Revision Should Carefully Restrict Procedures for Exemptions.

Another goal of the proposed revision is to "[s]pecify alternative compliance procedures for undertakings excepted from the normal alternative process. . . ." 74 Fed. Reg. at 68,863. This suggests that the revised National PA will identify a process for the use of exemption lists or will identify certain categories of projects that will likely result in a finding of "no potential to cause effects" or "no historic properties affected," as defined in 36 C.F.R. §§ 800.3(a)(1) and 800.4(d)(1). This is a practice now reflected in state protocols and in the National PA itself at section 5(b.)

However, the use of exemptions raises several concerns. First, the revised National PA should include a mechanism for providing the public and interested parties with notice of exempted projects before such projects receive final approval, and a kick-out clause—a process for resolving disputes about whether an exemption is applicable to a specific project. If an objection is raised by a SHPO, tribe, the Advisory Council, or other interested party, a project should not be subject to an exemption from Section 106 review. This issue frequently arises where agency staff is given unilateral authority to conclude, for example, that an undertaking will result in a determination of "no historic properties affected" without any involvement from other parties who may provide different points of view about the eligibility of a property or potential effects of a project.

Second, the development of any specific list of exemptions should itself be the subject of consultation, because widely varying viewpoints will likely exist about

whether particular activities are appropriate for an exemption. In addition, once an exemption list is ultimately developed, annual reporting should be required, documenting how and to what projects exemptions have been applied.

VI. BLM Should Expand the Role and Composition of the BLM Preservation Board.

We also recommend that BLM change the composition of the Preservation Board to include representatives from other signatories of the National PA, as well as tribes and other interested groups. The Preservation Board could even take a similar approach to BLM's Resource Advisory Councils in terms of its composition. Such an approach was suggested in the reports of the tribal listening sessions, which indicated an interest in including tribal representation on the board. Changing the membership structure may be useful in making it less of an "insider's club" and more representative of interests and organizations with concerns about BLM's cultural resource management practices.

VII. BLM Must Renew Its Commitment to Achieving the "Proactive" Preservation Measures of the National PA.

The 1997 National PA aims to "enable BLM, SHPO and Council staffs to devote a large percentage of their time and energies to proactive work" by identifying "efficiencies in the Section 106 process. . . ." National PA at 4. Unfortunately, this promise has not materialized. While the National PA has certainly streamlined the Section 106 process, it appears that the principal proactive contribution of the PA has been data-sharing in cooperation with SHPOs. This effort has been helpful as state and federal agencies work to develop and populate GIS databases with information needed to make future decisions about projects that could affect historic properties. There are also good examples of successful public educational and interpretation efforts undertaken by various BLM offices, such as those at Canyons of the Ancients National Monument in Colorado.

However, streamlining has not resulted in increased numbers of National Register nominations, expanded historic contexts, better planning, or priority-based historic resource protection. For example, Utah BLM recently submitted National Register nominations for Nine Mile Canyon, only after years of urging from the National Trust, Colorado Plateau Archaeological Alliance, Nine Mile Canyon Coalition and others. This was the first National Register nomination prepared by Utah BLM in many years, despite the National PA's streamlining measures, and despite the clear mandate of Section 110 of the NHPA that historic properties under the agency's jurisdiction and control be nominated to the National Register. 16 U.S.C. § 470h-2(a)(2)(A).

To ensure that the National PA's streamlined compliance procedures actually result in increased proactive cultural resources work, BLM should include specific benchmarks in the revised National PA (e.g., nominating a certain number of historic properties to the National Register per year). Doing so will also assist BLM state and

field offices in carrying out their proactive management responsibilities under Section 110 of the NHPA and section 14 of the Archaeological Resources Protection Act.

VIII. BLM Must Renew Its Commitment to Complying with the National PA's "Thresholds for Council Review."

It has been the National Trust's experience that BLM needs to be more aggressive in employing section 4 of the National PA: "Thresholds for Council Review." While we believe that the language of section 4 is adequate, in practice, we have had difficulty convincing BLM to request the Advisory Council's involvement, even when the thresholds of section 4 have clearly been surpassed. For example, at Utah's Nine Mile Canyon, BLM did not involve the Council in consultation until more than five years after consultation had been underway with the SHPO, even though the Hope Tribe and the National Trust had been urging BLM to involve the Council for years.

IX. BLM Should Evaluate the Effectiveness of the National PA's Accountability Measures.

The National PA contains a number of accountability measures that we believe have not been consistently met, e.g., annual reports prepared by State Directors, Preservation Board reviews of states and/or field offices, etc. National PA at Section 9. The revision process should include a comprehensive audit of the status of these accountability measures. In particular, through the revision process, BLM should aim to make the annual reporting requirement more consistent, meaningful, transparent and accessible to the public. Based on prior conversations we have had with several SHPO offices, we are also aware that some SHPOs have expressed concerns about BLM's incomplete and/or inadequate reporting.

X. Conclusion

Thank you for the opportunity to provide comments at this early stage in the revision process for BLM's National PA. We would welcome the opportunity to meet with you to discuss our concerns and recommendations, and look forward to providing BLM with additional comments once the draft revision is ready for public review.

Sincerely,

Elizabeth S. Merritt

Elizabeth S. Merritt
Deputy General Counsel

Ti Hays

Ti Hays
Public Lands Counsel

Attachments

1. BLM, Letter from Patrick Gubbins, Price Field Office Manager, to Michael Smith, Public Lands Counsel, National Trust (Oct. 9, 2003).

2. BLM, Environmental Assessment UT-090-07-10, Permitted Jeep Use of Arch Canyon and the Hotel Rock Area 4, 26 (2007).

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03/02/2010 01:30 PM

To jerry_cordova@blm.gov
cc robin_burgess@blm.gov
bcc
Subject Northern Arapaho THPO Comments on Revision

Hello, I am submitting comments on the revision strategy to the PA. Please keep me informed of the progress of the PA.

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2010 BLM PA strategy for SHPO Advisory Council & THPO ltr.doc

Hoinon'eiteen

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March 1, 2010

Mr. Jerry Cordova
BLM Tribal Coordinator
Department of Interior
Washington, D.C. 20240

RE: REVISION OF PROGRAMMATIC AGREEMENT STRATEGY, 2009

The Northern Arapaho THPO has reviewed the "*Strategy for Revision of the Programmatic Agreement Among the Bureau of Land Management, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers*" and the comments from the eight *Regional Tribal Listening Sessions.* Our office is seeking clarification not only from BLM but other federal agencies on the development and understanding of the programmatic agreement process. The "Key Goals of the Revision" emphasize this clarification process with the ACHP, NCSHPO, BLM , NATHPO and finally the tribal governments. The strategy for revisions have covered a wide range of concerns which I hope will be addressed in the final document. I have listed a few of my comments in respect to Wyoming projects.

- The incorporation of the Native American Tribal Governments or Tribal Historic Preservation Offices into the revision of the programmatic agreement is a necessity. This is reflected in the terminology "government-to-government" consultation as required by federal policies implemented in cultural resource management procedures.

- Working in cooperation with the WY SHPO is a valuable tool for our office. Sharing tribal consultation occurrence with a specific project would assist not only the SHPO but our office. Wyoming is a crossroads for numerous tribal people who are reflected in those tribes who reside outside of Wyoming and are active in tribal consultation with BLM.

- Clarification of the consulting roles especially tribal in the NHPA and NEPA requirements on BLM lands would help in the review process by our office.

Thank you for asking the Northern Arapaho THPO to comment on the proposed strategy for revisions to the nationwide programmatic agreement.

Sincerely,

Darlene Conrad
THPO